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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]-1911

No. [redacted]9

ACME HARVESTER COMPANY, PLAINTIFF IN ERROR,

vs.

BEEKMAN LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED [redacted]

(21,510.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 148.

ACME HARVESTER COMPANY, PLAINTIFF IN ERROR,

vs.

BEEKMAN LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the said Supreme Court, before you, at the October Term, 1908, thereof, between Beekman Lumber Company, Respondent, and Acme Harvester Company, Appellant, a manifest error hath happened, to the great damage of the said Appellant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if Judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C. not exceeding thirty days from and after date of citation in said cause in the said Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of January, in the year of our Lord One Thousand Nine Hundred and Nine.

Issued at office in the City of Jefferson with the seal of the Circuit Court of the United States, for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States Circuit Court for the Western District of Missouri, Central Division.]

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by
LEROY B. VALLIANT,
Chief Justice Supreme Court of Missouri.

[Endorsed:] No. —. United States Circuit Court, Western District of Missouri, Central Division. Beekman Lumber Co., Resp't, vs. Acme Harvester Co., App'l't. Writ of Error to the Supreme Court of Missouri.

2 The United States of America to Beekman Lumber Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme

Court of Missouri, wherein Acme Harvester — is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chief Justice of the Supreme Court of Missouri, this 9th day of January, in the year of our Lord One Thousand Nine Hundred and Nine.

LEROY B. VALLIANT,
Chief Justice Supreme Court of Missouri.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, ss:

I hereby acknowledge due service of the within Citation, this 19th day of January A. D. 1909.

STEWART TAYLOR,
Attorney for Defendant in Error.

[Endorsed:] Supreme Court of Missouri. Beekman Lumber Co., Respondent, vs. Acme Harvester Co., Appellant. Citation.

3 No. 13180.

BEEKMAN LUMBER CO., Resp.,
vs.
ACME HARVESTER COMPANY, App.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to-wit, on the 11th day of September, 1905, there was filed in the office of the clerk of the Supreme Court of Missouri a transcript in a certain cause wherein the Beekman Lumber Company was respondent and the Acme Harvester Company was appellant, which said transcript is in words and figures as follows, to-wit:

Be it remembered that on the 60th day of the regular April Term, 1905, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 20th day of June, 1905, the following proceedings were had and made of record before the Hon. W. B. Teasdale, Judge of Division No. 3, in the cause entitled:

16625.

BEEKMAN LUMBER COMPANY
v.
ACME HARVESTER COMPANY.

Now comes plaintiff and files reply, and come parties plaintiff and defendant by their respective attorneys, and to try this cause come the following jury, to-wit: G. H. Monahan, M. H. Griffith, W. G. Bennett, H. Joffee, B. S. Dow, H. S. Banta, H. S. Hovey, Jos. Scholl, Chas. H. Miles, G. P. Fisher, James L. De Long, M. G.

Ernest twelve good and lawful men from the body of the County who were duly empanelled, tried and sworn after hearing the evidence instructions of the Court and arguments of counsel return the following verdict, to-wit:

"We the — find for the plaintiff and assess its damages at the sum of Fifteen Hundred Eighty-Seven and 52/100 ($1582.52) Dollars.

M. H. GRIFFITH, *Foreman.*"

4 It is therefore considered and adjudged by the Court that the plaintiff recover from said defendant the said sum of Fifteen Hundred eighty-seven and 52/100 ($1587.52) dollars, with interest thereon from this date at the rate of six per cent per annum, together with the costs of this cause and have execution therefor; and the Court doth further find that the defendant not having denied the grounds of attachment, the same stands confessed as true, and that the plaintiff's attachment be sustained. And the garnishee, the Union Bank of Commerce having admitted in its answer the possession of $1342.45, money of the defendant, it is therefore considered and adjudged by the Court that plaintiff recover from said garnishee the Union Avenue Bank of Commerce the said sum of $1342.45 so confessed in its answer and have execution therefor, that said garnishee be allowed the sum of $25.00 as attorney's fee, and that defendant be given credit hereon for whatever sum plaintiff may collect from said garnishee.

On the 81st day of the regular April Term, 1905, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 15th day of July, 1905, the following further proceedings were had and made of record in the cause entitled.

16625.

BEEKMAN LUMBER COMPANY
vs.
ACME HARVESTER COMPANY.

Now on this day the motion for a new trial, and motion in arrest of judgment are by the Court overruled, to which ruling of the Court defendant excepts, and now comes the defendant and files affidavit for appeal, which appeal is by the Court allowed to the Supreme Court of Missouri, and defendant files bond in the sum of Thirty Five Hundred Dollars, with the American Surety Company of New York as surety, which bond is by the Court approved, and defendant has to or before November 1st, 1905, to file its Bill of Exceptions.

5 STATE OF MISSOURI,
County of Jackson, ss:

I, Harry G. Henley, Clerk of the Circuit Court, within and for the *the* County and State aforesaid, do hereby certify that the fore-

going is a full, true and complete copy of the judgment and order allowing appeal in the cause entitled Beekman Lumber Company is plaintiff and Acme Harvester Company is defendant, as the same appears of record and on file in my office.

In witness whereof, I hereunto set my hand, and affix the seal of said Circuit Court, done at office in Kansas City, this 18th day of July, A. D. 1905.

H. G. HENLEY, *Clerk.*

[SEAL.] By D. M. McCLANAHAN, *D. C.*

STEWART TAYLOR,
Att'y for Pl'ff.
KARNES, NEW & KRAUTHOFF,
Att'ys for Def't.

6 Afterwards, to-wit, on the 13th day of December, 1907, there was filed abstract of record for appellant, which said abstract of record is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1907. January Call, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Abstract of Record for Appellant.

This cause originated in the Circuit Court of Jackson County, Missouri, at Kansas City, on December 7, 1903, by the filing of the following petition:

"Plaintiff states that it is and was a corporation organized under the laws of the State of Missouri; that defendant is and was a corporation organized under the laws of the State of Illinois, having its chief office and place of business at Peoria, in said state.

"For cause of action plaintiff states that the defendant owes it the sum of Fourteen Hundred Fifty-three Dollars and Fifty-eight Cents for lumber sold and delivered by plaintiff to defendant; the particulars of all which and also the credits thereon will appear by an itemized account hereto annexed and filed and marked exhibit "A."

7 "Wherefore, plaintiff asks judgment for Fourteen Hundred Fifty-three Dollars and Fifty-eight Cents being the balance due it, together with six (6) per cent interest thereon per annum from demand of payment, to-wit, from the — day of ——, 1903, and for costs."

Attached to this petition and filed therewith was the following document:

"EXHIBIT A.

1903.	Acme Harvester Co., Peoria, Ill.			
June 18—				
Car No. 42149—4597 ft. Y. P. at..	$21.00	$96.54		
13519 ft. Y. P. at.....	30.00	405.57	$502.11	
Freight.....	240.75			
Rejects, allowed.....	31.80		272.55	$229.56
June 27—				
Car No. 26619—7258 ft. Y. P. at..	28.00		203.22	
Freight.....	73.50			
Rejects, allowed.....	19.51		93.01	110.21
July 2—				
Car No. 39652—16882 ft. Poplar at.....	30.00		506.46	
Freight..	116.00			
Rejects, allowed.....	.93		116.93	389.53
July 18—				
Car No. 10193—11965 ft. Y. P. at..	28.00		335.02	
Freight.....	110.39			
Rejects, allowed.....	221.68		332.07	2.95
July 20—				
Car No. 32434—14300 ft. Cottonwood at.....	34.00		486.20	
Freight.....	99.36			
Rejects, allowed.....	64.97		164.33	321.87
July 16—				
Car No. 5835—10345 ft. Y. P. at..	28.00		289.66	
Freight.....	89.26			
Rejects, allowed.....	62.92		152.18	137.48
8				
July 24—				
Car No. 35415—18016 ft. Poplar at.....	31.50		567.50	
Freight.....	120.00			
Rejects, allowed.....	4.97		124.97	442.53
August 1—				
Car No. 58380—15199 ft. Poplar at.....	31.50		478.77	
Freight.....	137.28			
Rejects, allowed.....	21.04		158.32	320.45
				$1,954.58
October 5—				
By cash.....			500.00	
By expense, hauling.....			1.00	501.00
Balance due.....				$1,453.58

At the filing of the petition there was also filed an affidavit in attachment made by an agent of and on behalf of the plaintiff in the statutory form. The amount of the debt stated in the affidavit is $1,453.58, and the ground of the attachment was: The defendant is a corporation whose chief office or place of business is out of the state of Missouri.

The sheriff of Jackson county, Missouri, made a return on the writ of summons to the effect that he executed the writ by making diligent search for and failing to find any office or officer of the within named defendant corporation, Acme Harvester Company, in Jackson county, Missouri.

There was also served a writ of garnishment upon E. I. Burton.

Afterward, on June 2, 1904, an additional writ of attachment was issued in the case, and on this writ of attachment so issued M. H. Lamb and the Union Avenue Bank of Commerce were summoned as garnishees of Acme Harvester Company.

On December 24, 1903, defendant, Acme Harvester Company, filed a motion to stay the proceedings against it, this motion being as follows (caption omitted):

9 *Motion to Stay Proceedings.*

"Now on this day comes the defendant, and limiting its appearance to the purposes of this motion, states there is pending against it in the District Court of the United States for the Southern Division of the Northern District of Illinois, a petition in involuntary bankruptcy. No adjudication has been entered in said proceeding.

Wherefore, in accordance with the provisions of the national bankruptcy act in such cases made and provided, the defendant moves the court to stay the pending suit until an adjudication has been entered or the proceeding has been dismissed, and in the event of an adjudication for a period of twelve months thereafter, unless an application for a discharge shall have been filed in the meantime, in which event the pending suit is to be stayed until the application for discharge has been decided."

On January 11, 1903, the motion to stay proceedings was sustained.

On March 30, 1904, defendant filed a motion to set aside the order staying the proceedings, and this motion, on May 14, 1904, was sustained by the court.

Referring to the garnishment served on E. I. Burton, at the return day of the writ, January 11, 1904, interrogatories were filed to Burton, and thereafter, on July 7, 1904, E. I. Burton was discharged as garnishee herein.

The summons of garnishment served on M. H. Lamb and Union Avenue Bank of Commerce, was returnable to the October Term, 1904, of the Circuit Court of Jackson County, Missouri, at Kansas City, and on October 10, 1904, the return day of the writ, interrogatories addressed to M. H. Lamb and Union Avenue Bank of Commerce as garnishees of Acme Harvester Company, were filed by the plaintiff.

On November 1, 1904, Union Avenue Bank of Commerce as garnishee of Acme Harvester Company filed an answer stating that "at the time of the service of the garnishment, it was indebted to the said defendant in the sum of $1,342.45, and that it has not since been indebted to said defendant in any other or greater sum."

No answer seems to have been filed by M. H. Lamb
10 as garnishee of Acme Harvester Company to the interrogatories exhibited to him.

On October 12, 1904, defendant filed an answer in the nature of a plea to the jurisdiction of a plea in bar and of a plea to the merits, as follows (caption omitted):

Answer.

"Now, on this day comes Acme Harvester Company, and appearing specially for the purposes of this plea only, pleads to the jurisdiction of this court, and says this cause should not be prosecuted. Defendant further avers that heretofore, in the District Court of the United States for the Northern District of Illinois, Southern Division, a court of competent jurisdiction in that behalf, a petition was filed to adjudicate Acme Harvester Company a bankrupt. Thereafter it was by said court ordered and adjudged that Beekman Lumber Company be enjoined until the further order of that court, from maintaining this proceeding or prosecuting this action. The proceedings resulting in such injunction were duly had and the order and judgment of injunction were duly rendered.

The defendant by way of protestation and for answer to the petition of the plaintiff, denies generally each and every allegation therein sustained."

To this pleading on the part of the defendant the plaintiff on June 20, 1905, filed a reply as follows (caption omitted):

Reply.

"Plaintiff for reply to the answer of defendant denies each and every allegation of new matter therein made or contained.

For further reply plaintiff shows to the court that the matters set forth in said reply were set forth in defendant's motion to stay proceedings, herein filed December 24th, 1903, which motion was by this court sustained; that afterwards on the — day ——, 1904, this plaintiff filed its motion to set aside said stay order, on the ground among others that said matters did not entitle the
11 defendant to a stay; that said motion was sustained and no appeal was taken therefrom and thereby the matters and things set forth in defendant's answer were adjudged against it and became and are res judicata and the defendant cannot now be heard to urge the same.

Wherefore plaintiff prays judgment as in its petition.

STEWART TAYLOR,
Attorneys for Plaintiff."

The case was tried at the April Term, 1905, of the Circuit Court of Jackson county, Missouri, and on June 20, 1905, the Honorable William B. Teasdale, Judge, presiding. At the close of the evidence the trial court directed the jury to return a verdict in favor of the plaintiff, and thereupon, in accordance with the directions of the court, the jury did return a verdict in favor of the plaintiff and did assess the damages to be recovered by the plaintiff of the defendant at the sum of $1,587.52.

Thereupon it was considered and adjudged by the court that the plaintiff do have and recover of the defendant the sum of $1,587.52, the damages by jurors in form aforesaid assessed, and also the costs of the plaintiff in this behalf expended and have thereof execution. The court did further find that the defendant, not having denied the grounds of attachment, the same stood confessed as true and plaintiff's attachment was sustained and the garnishee, Union Avenue Bank of Commerce, having admitted in its answer the possession of $1,342.45, the money of the defendant, it was considered and adjudged by the court that the plaintiff do have and recover of and from said garnishee said sum so confessed in its answer, and have execution therefor and that said garnishee be allowed the sum of $25 as attorneys' fees, and that defendant be given credit on the judgment for whatever sum the plaintiff may collect from the garnishee.

The foregoing judgment was entered at the April Term, 1905, of the Circuit Court of Jackson county, Missouri, at Kansas City, and on June 20, 1905.

Thereupon at the same term of court, that is to say, at the April Term, 1905, of the Circuit Court of Jackson county, Mis-
12 souri, at Kansas City, at which the trial was had and judgment rendered, the defendant filed herein a motion for a new trial and a motion in arrest of judgment.

On July 15, 1905, and at the April Term, 1905, of the Circuit Court of Jackson county, Missouri, at Kansas City, the motion for a new trial filed by the defendant, and the motion in arrest of judgment filed by the defendant, were overruled by the court, to which action of the court defendant at the time excepted. Thereupon, and at the April term, 1905, of the Circuit Court of Jackson county, Misouri, at Kansas City, the defendant filed herein an affidavit for appeal in words and figures as follows (caption omitted):

Affidavit for Appeal.

"Defendant prays the court to grant it an appeal herein to the Supreme Court of Missouri.

KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

Edwin A. Krauthoff, being duly sworn, upon his oath states that he is one of the agents and attorneys for defendant, and as such makes this affidavit—the appeal prayed is not taken for vexation

or delay, but because affiant verily believes the appellant is aggrieved by the judgment and decision complained of.

EDWARD A. KRAUTHOFF.

Subscribed and sworn to before me, July 15, 1905.

H. G. HENLEY, *Clerk.*
M. J. PENDERGAST, *D. C.*"

Thereupon, at the April Term, 1905, of the Circuit Court of Jackson county, Missouri, at Kansas City, and on July 15, 1905, the court granted the defendant herein an appeal to the Supreme Court of Missouri, as prayed.

On July 15,1905, and at the April term, 1905, of the Ciircuit Court of Jackson county, Missouri, at Kansas City, the court, for good cause shown, gave the defendant until on or before November 1, 1905, in which to file a bill of exceptions herein.

13 And thereupon on October 12, 1905, the defendant filed herein its bill of exceptions, which was by the court allowed, signed and sealed and made a part of the record herein, and directed by the court to be filed by the clerk. By an entry made of record on October 12, 1905, the clerk of the Circuit Court of Jackson county, Missouri, did file such bill of exceptions, and such bill of exceptions is in words and figures as follows, to-wit:

Bill of Exceptions.

In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1905.

No. 16625. Div. 3.

BEEKMAN LUMBER COMPANY, Plaintiff,
vs.
ACME HARVESTER COMPANY, Defendant.

Be it remembered that on the 20th day of June, 1905, and at the April Term, 1905, of said Circuit Court, this cause coming on for trial before Hon W. B. Teasdale, judge of said court, and a jury duly empaneled and sworn, plaintiff appearing by its attorney, Stewart Taylor, and defendant appearing by its attorneys, Karnes, New & Krauthoff, proceedings were had as follows, to-wit:

Plaintiff to sustain the issues upon its part offered and introduced evidence as follows, to-wit:

G. H. LOWRY, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. TAYLOR:

Q. Mr. Lowry, state your name and residence?
A. Name is G. H. Lowry; residence 3310 Michigan.

Q. What connection have you with the Beekman Lumber Company?

A. Secretary and manager.

Q. And have been so connected for how long?

A. Since its organization in 1898, I think it was.

Q. Are you acquainted with the Acme Harvester Company people?

A. Yes, sir.

Q. Did you have transactions with them of any extent?

A. Yes, sir.

14 Q. Were you ever at Peoria in connection with your business with them?

A. Frequently; dozens of times.

Q. About how often?

A. Well, five or six times a year for a period of two or three years.

Q. That is an Illinois corporation?

A. Yes, sir.

Q. Who were the officers of that company?

Defendant objects to the introduction of any evidence under the petition, for the reason that the alleged statement of the account attached to the petition is too indefinite and uncertain and so indefinite and uncertain and mixed as not to apprise the defendant, the court or jury what plaintiff's cause of action is based on and what plaintiff sues for; and for the further reason that the items of the account are not set forth in the petition or in any exhibit attached thereto; and for the further reason that the plaintiff has been enjoined from prosecuting the suit in the District Court of the United States for the Northern District of Illinois.

The court overruled the objection.

To which ruling of the court defendant then and there duly excepted.

A. Answer the question?

Q. If you remember it?

A. The president, Mr. Binnian; the vice-president, Mr. Stone, and the treasurer, Mr. Hastings.

Q. Are you familiar with the signatures of each of those gentlemen?

A. Mr. Hastings and Mr. Stone; I don't think I am with Mr. Binnian's; it did not come in his department; also some of the clerks, Mr. Bartlett particularly.

Q. What transaction did you have with the company out of which this suit arose?

A. We sold them different lots of lumber at different times ranging over a period of two or three years.

Q. State the manner in which the sales were made or brought about?

A. The chief sales were made by going to their office and negotiating. Some of the smaller contracts were made by correspondence.

Q. Was that true as to the times in the account sued
15 on?

A. Yes, sir. In the account as it stands now, a portion was on a contract that I made with them in their office, and a portion of it was on orders by mail.

Q. Orders by mail? Have you those with you?

A. Yes, sir. I have all the orders with me. The contracts that were made in their office were confirmed in writing and sent by mail.

Q. So that you have here all of the contracts?

A. Yes, sir.

Q. All of the orders?

A. Yes, sir.

Q. Now, when orders were given and goods shipped in accordance with the orders, what was the next step?

A. Well, as fast as we could make the shipments we rendered invoices to the company, and then as fast as the cars arrived covered by the invoices they unloaded the shipments and tallied them out. If they were found to be in accordance with our bill and account and invoice, they would so advise us and pass the invoice to the treasurer for payment. If there was any difference between their inspection or tally of figures and the invoice, they would advise us to the effect and ask us to authorize them to make correction of our invoice.

Q. Have you such writings from them as to each car involved in this suit?

A. Yes, sir.

Q. That is statement of their revision of the account?

A. Yes, sir.

Q. After the receipt of the lumber?

A. Yes, sir, where there was any revision.

Q. Have you any summary of the account from the defendant?

A. Yes, sir.

Q. I will ask you to turn to that.

A. Here it is.

Q. Just state how this came to be sent to you?

A. Well, our accounts did not agree and in order to check them up we asked them to furnish us a complete statement.

Q. I hand you letter, dated November 18, 1903, purporting to be signed by the Acme Harvester Company by H. I. Stone?

A. H. C.

Q. H. C. Stone, and ask you if that is a letter received by you and relating to this transaction?

A. Yes, sir.

16 Q. Also, I direct your attention to a letter of November 19, signed W. C. Bartlett, Acme Harvester Company, and ask you if that is a letter received by your company?

A. Yes, sir.

Q. Now look at the paper attached to the last letter and state whether that is the account referred to in the letter?

A. Yes, sir.

Defendant objects to the question, for the reason that the times of the account are not sufficiently set forth or set forth at all in the petition or in any exhibit attached thereto, and defendant objects to any further evidence on that line.

The COURT: Why didn't you file a motion to make more definite and certain?

Mr. CAMACK: Because the Court of Appeals says it was not necessary. It may be made at either time, your Honor. I will show you where the Court of Appeals makes that statement.

The court overruled the objection.

To which ruling of the court defendant then and there duly excepted.

Q. Mr. Lowry, I will ask you to take the account stated attached to your petition and compare that with the account furnished by the defendant to you as you have just testified, and state what the result of your comparison is?

A. They are identical.

Q. State then whether you adopted the statement of account sent you by the defendant as the account for suit and as your account with them?

A. Yes, sir; we made them the allowances that they claim.

Mr. TAYLOR: I will offer in evidence the letters identified as of November 18 and 19, Stone and Bartlett, and the account furnished by defendant.

Defendant objects to the offer, for the reason that there is no sufficient statement of the account set forth in the petition, attached thereto, upon which to base the offer, or upon which to base the introduction of any evidence in this action.

The court overruled the objection.

To which ruling of the court defendant then and there duly excepted.

17 The letters and the account above referred to were marked by the stenographer, respectively, "Exhibit A, B and C," and are respectively in words and figures as follows, to-wit:

"EXHIBIT A."

Acme Harvester Company, W. H. Binnian, President; H. C. Stone, Vice-President; O. J. Hastings, Treasurer; F. W. Stith, Sales Manager; Manufacturers of Hodges Steel Headers, Harvester King 12-ft. Binders and Headers, Hand and Horse Dump Steel Spring-Tooth Rakes, Craver and Randolph Headers, Hodges Queen Binders and Mowers, Sweep Rakes, Stackers, and other Agricultural Implements; Established 1860; Incorporated 1880; Factory (Terminal Station), Peoria, Illinois.

(TERMINAL STATION), PEORIA, ILL., *Nov.* 19, 1903.

Address all communications to the Company.

Beekman Lumber Co., Kansas City, Mo.

GENTLEMEN: As per your request of the 17th, we take pleasure in enclosing herewith detailed statement showing amounts which

have been passed to your credit on account of cars shipped us. We trust that this statement will meet with your approval, and beg to remain,

Yours very truly, W. C. BARTLETT.

Mark reply "W. C. B."
(Enc.)

"EXHIBIT B."

11/18/1903.

Detailed Statement of Lumber Shipped by Beekman Lumber Co. and Now Unsettled For.

Invoice date.	Car No.	Original am't of invoice.	Am't as charged per our reports.	Freight.	Amount credited to Beekman.
6/18/03	42149 LS & MS.....	$502.11	$470.31	$240.75	$229.56
6/27/03	26618 Sou. transf.				
	29673 CB & Q.....	203.22	183.71	73.50	110.21
		(in pencil	190.73)		
7/2/03	39652 IC.....	506.46	505.53	116.00	389.53
18					
7/16/03	5835 M & O transf.				
	1867 H & St. J.....	289.66	226.74	89.26	137.48
7/18/03	10193 IC transf.				
	1269 CNO & TP.....	335.02	113.34	110.39	2.95
7/20/03	32434 NP.....	486 20	421.23	99.36	321.87
		(in pencil	466.30)		
7/24/03	35415 IC.....	567.50	562.53	120.00	442.53
8/10/03	58380 NYC & HR.....	478.77	457.73	137.28	320.45
		$3368.94	$2941.12	$986.54	$1954.48
Oct. 1st.	Remittance.....				500.00
Oct. 19th.	Charges for handling lumber.....				1.00
	Balance.....				$1453.58

"EXHIBIT C."

W. H. Binnian, Pres't. O. J. Hastings, Sec'y & Treas.
H. C. Stone, Vice-Pres't. F. W. Stith, Sales Manager.

Acme Harvester Company,
Manufacturers of Agricultural Implements.

Established 1860. Incorporated 1880. AHC Hodges Headers and Hay Tools.

PEORIA, ILLINOIS, *Nov.* 18, 1903.

Beekman Lumber Co., Kansas City, Mo.

GENTLEMEN: We note your request under date November 17th for detailed statements, and will take pleasure in complying with the same.

Now, referring to the matter of having you sign Credit Com-

mittee's agreement would say, gentlemen, that this is absolutely the only way out of your difficulty. Judge Kohlsaat, of the United States Court, has stopped the matter of anyone bringing suit against this Company, and unquestionably its business will be turned over to the Credit Committee. As far as this Company or the Committee advancing you 50c. on the dollar on your claim is concerned, would say that such an idea is impractical, and could not for a moment be considered for obvious reasons. The quickest way for you to get returns on your account is for you to sign the Credit Committee's agreement. If you want any further light as
19 to way you should take this step, we would refer you to the Credit Committee's attorneys, Newman, Northrup, Levinson & Becker, of Chicago.

Yours very truly,

ACME HARVESTER CO.
H. C. STONE, *Vice-Pres't.*

Mark reply "H. C. S."

Q. I will ask you to identify the orders in this account, orders for lumber—I don't know as it is necessary to take up the time of the court and jury in going through that. We'll let that rest for further— State whether any part of this account has been paid?

A. No, sir.

Q. The amount, with interest to date, amounts to how much, Mr. Lowry?

Mr. CAMACK: Defendant objects at this time to any further evidence for the reason that the plaintiff has been enjoined from prosecuting this action, and desires at this time to offer in evidence the injunction of the District Court of the United States for the Northern District of Illinois, if your Honor will permit us to offer this at this time.

The COURT: Certainly, you may offer it.

Mr. CAMACK: I believe they are certified copies, and will prove themselves. We desire to offer the petition and the order of injunction enjoining the plaintiff from prosecuting this suit. (Which document was marked "Exhibit D" by the stenographer); and I also desire to offer in evidence the petition upon which the writ of injunction or restraining order is issued or was issued out of the District Court of the United States for the Northern District of Illinois (said document was marked by the stenographer "Exhibit E").

Defendant also offers in evidence the original petition filed in bankruptcy against said Acme Harvester Company, in the said District Court of the United States for the Northern District of Illinois.

Plaintiff objects to the offer of the proposed evidence on the ground, first, that the alleged writ of injunction was issued
20 in the State of Illinois without jurisdiction over the person of defendant or over the subject-matter of this injunction, and that being served outside of the jurisdiction of the District Court of Illinois, said court was wholly without jurisdiction to grant the order and the order as granted is a nullity.

Plaintiff further objects to the plea of pendency of bankruptcy

proceedings in the State of Illinois, because it is not shown that the bankrupt court has ever acted upon a petition other than to find the defendant solvent and to refuse adjudication in bankruptcy and that the time which has elapsed since October, 1903, is such as to deprive the bankruptcy court of jurisdiction at this time; for the further reason that no trustee in bankruptcy has applied for a stay of proceedings herein but that this application for a stay, if any, has been made by the defendant in his own capacity.

Plaintiff further objects to the proposed evidence upon the ground that the matter is *res adjudicata* in that the same matter was set up by motion for a stay of proceedings herein and the motion was by this court sustained, and subsequently the plaintiff filed its motion to set aside the stay order and the same was by the court sustained and no appeal was taken therefrom by defendant and the matters therein adjudicated thereby became *res adjudicata*.

The COURT: The defendant's objection to the question asked by the plaintiff is overruled and excepted to.

The plaintiff's objections to the testimony offered by the defendant at this time are sustained and excepted to. I think it is proper enough for you, as a matter of defence, to make those offers, but I don't think this is the proper time to put them in under the objection to the testimony offered by the plaintiff. The question is, Mr. Lowry, what is the amount due.

By Mr. TAYLOR:

Q. With interest to this time?

A. The net amount of the account is $1456.58, and I figured the interest for 18 months and 13 days.

The COURT: Wait a moment. Where is your demand?

21 Mr. TAYLOR: The demand would be represented by the filing of the petition.

The COURT: I want to get that in the record. I want to get some date to figure interest from.

WITNESS: I figured the interest from December 7, 1903.

Q. What date was that Mr. Lowry?

A. The date of the filing of the suit.

Q. You had made demand, however, before that time?

A. Yes, sir.

By the COURT:

Q. What is the total amount then?

A. Interest $133.94, making a total of $1587.52.

Cross-examination declined.

Plaintiff here rested.

Whereupon defendant asked an instruction in the nature of a demurrer to the evidence, which is in words and figures as follows, to-wit:

The jury are instructed that their verdict must be for the defendant.

Which instruction the court refused; to which action and ruling of the court defendant then and there duly excepted.

Defense.

Defendant to sustain the issues upon its part offered and introduced evidence as follows, to-wit:

Defendant offers in evidence certified copy of the petition in bankruptcy filed against the said defendant Acme Harvester Company in the District Court of the United States for the Northern District of Illinois, Southern Division, on the 23rd day of November, 1903.

Defendant further offers in evidence certified copy of the petition for a restraining order against this plaintiff herein filed by this defendant the Acme Harvester Company in the District Court of the United States for the Northern District of Illinois, on the 3rd day of October, 1904.

22 Defendant further offers in evidence certified copy of the restraining order and writ of injunction issued by the District Court of the United States for the Northern District of Illinois, in a case entitled, In the Matter of the Acme Harvester Company, alleged bankrupt, No. 599, in which this plaintiff is restrained from prosecuting this action against this defendant, said order having been granted or entered in said court on the 3d day of October, 1904.

The papers above referred to were marked by the stenographer respectively, Exhibits D, E and F, and respectively, are in words and figures as follows, to-wit:

"EXHIBIT D."

In the District Court of the United States for the Northern District of Illinois, Southern Division.

In the Matter of ACME HARVESTER COMPANY, a Corporation, Bankrupt.

To the Honorable Judge of the District Court of the United States for the Northern District of Illinois:

The petition of Henry & Allen, a corporation organized and doing business under and by virtue of the laws of the State of New York, and having its principal place of business at Auburn, in said State of New York; South Arm Lumber Company, a corporation doing business under and by virtue of the laws of the State of Illinois, and having its principal place of business at Chicago, in said District, and William J. Henry of Auburn, New York, respectfully shows that the Acme Harvester Company is a corporation organized under and by virtue of the laws of the State of Illinois for manufacturing purposes, and has for a period of more than six months next preceding the date of the filing of this petition been engaged in the manufacture of harvesting machines, agricultural implements and like

merchandise in the city of Peoria, and had its principal place of business in said District and in the Southern Division thereof.

That said Acme Harvester Company owes debts to the
23 amount of one thousand dollars and over, and is insolvent; that your petitioners are creditors of said Acme Harvester Company having provable claims against it, which amount in the aggregate, in excess of the value of the securities held by them, to more than five hundred dollars; that no one of your petitioners is entitled to priority of payment of its said claim within the meaning of section 64-*b* of the bankruptcy law of 1898, and the amendments thereof, nor has any one of your petitioners received preference within the meaning of section 60*a*-*b* of said law as amended; that the nature and amount of your petitioners' claims and the securities held by them are as follows:

The claim of Henry & Allen, a corporation as aforesaid, is for the sum of to-wit, twenty-two thousand, seven hundred eighty-two and 72-100 dollars ($22,782.72) and is for moneys due upon certain promissory notes executed by said Acme Harvester Company to the order of Henry & Allen for goods sold and delivered to said Acme Harvester Company by said Henry & Allen and is for a balance due upon a running account for goods, wares and merchandise sold to said Acme Harvester Company by said Henry & Allen and at the request of said Acme Harvester Company, and that the amounts due and owing upon said notes and for the balance due upon said account in favor of said Henry & Allen is for the sum of to-wit, twenty-two thousand seven hundred eighty-two and 72-100 dollars ($22,782.72) with interest at the legal rate from the date of maturity of said notes and accounts; that said sum with interest is still due and unpaid.

The claim of your petitioner, South Arm Lumber Company of Chicago, is for goods, wares and merchandise sold and delivered to said Acme Harvester Company at its special instance and request upon open account; that there is still due and unpaid the sum of to-wit, sixty dollars ($60.00).

The claim of William J. Henry is for moneys due upon a certain promissory note executed by said Acme Harvester Company for a valuable consideration to the order of and in favor of Henry
24 & Allen of Auburn, New York, and which said note is now the property of and held and controlled by said William J. Henry and upon which said note there is due to said William J. Henry the sum of four thousand seven hundred eighty and 52-100 dollars ($4780.52) with interest at the legal rate from the maturity of said note, to-wit, October 10, 1903.

And your petitioners further allege that said Acme Harvester Company is insolvent, and that within four months next preceding the date of this petition and of the filing hereof, and while insolvent (and with knowledge on the part of Steere & Burr of the insolvency of said Acme Harvester Company) it committed an act of bankruptcy in that it did heretofore, to-wit, on the 8th day of August, 1903, assign, transfer, convey and give over unto Steere & Burr of Boston, Massachusetts, and Chicago, Illinois, then existing creditors

of said Acme Harvester Company, a large portion of its assets, to-wit, the sum of one hundred thousand dollars ($100,000) by delivering to them a pretended assignment of a certain large sum of money due and owing to said Acme Harvester Company from a debtor of said Acme Harvester Company, with the intent thereby to prefer the said Steele & Burr, then existing creditors, over and above your petitioners and other creditors of the same class of the Acme Harvester Company, the effect of said transfer, assignment, conveyance and delivery being to enable the said Steele & Burr, creditors, to receive a greatest percentage upon the indebtedness due and owing to them by said Acme Harvester Company than has been or will be received by your petitioners and other creditors of the same class, of said Acme Harvester Company.

And your petitioners further represent that said Acme Harvester Company is insolvent and that within four months next preceding the date of the filing of this petition, and while insolvent, the said Acme Harvester Company committed divers acts of bankruptcy in that it did heretofore, to-wit, on sundry dates, the exact time being to your petitioners at present unknown transfer, convey and give over to certain then existing creditors of said Acme Harvester
25 Company a large portion of its property, the names of said creditors and their addresses and the amounts and value of said property transferred being at present unknown to your petitioners, but your petitioners allege and represent the fact to be that said property constituted a considerable portion of its assets and that the transferring and giving over of said assets to the then existing creditors and within the dates mentioned as aforesaid, was for the purpose of preferring said unknown creditors over and above your petitioners and other creditors of the same class, and that the effect of said transferring, assigning and conveying of such property to said unknown creditors was to enable said unknown creditors to receive a greater percentage of their indebtedness against said Acme Harvester Company than that received or to be received by your petitioners and other creditors of the same class of said Acme Harvester Company.

And your petitioners further allege that said Acme Harvester Company, within four months next preceding the date of this petition and of the filing thereof, while insolvent, committed a further act of bankruptcy in that it did heretofore, to-wit, on the 30th day of June, 1903, assign certain valuable contracts between said Acme Harvester Company and divers parties to your petitioners unknown, and did transfer and give over unto the First National Bank of Chicago, Illinois, a then creditor of said Acme Harvester Company, a large portion of its assets to-wit, the sum of four hundred thousand dollars ($400,000) by delivering to them a pretended assignment of contracts calling for and representing a large sum of money due and owing from said divers parties to said Acme Harvester Company, said transferring, assigning and giving over of said contracts being with the intent thereby to prefer said First National Bank, a then existing creditor, over and above your petitioners and other creditors of the same class, the effect of said transfer, assignment and giving

over, being to enable said First National Bank, a creditor, to receive a large percentage upon the indebtedness due and owing to
26 it by said Acme Harvester Company than has been or will be received by your petitioners and other creditors of the same class of said Acme Harvester Company.

Wherefore, your petitioners pray that service of this petition with a subpœna may be had upon said Acme Harvester Company as provided in the Act of Congress relating to bankruptcy and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

HENRY & ALLEN,
By GORDON W. ALLEN, *Treasurer.*
WILLIAM J. HENRY,
SOUTH ARM LUMBER CO.,
By C. B. HAFFENBERG,
Its Agent & Att'y.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, ss:

Gordon W. Allen, of Auburn, New York, being first duly sworn, deposes and says that he is treasurer of Henry & Allen, a corporation, one of the petitioners named herein and that he is duly authorized by said Henry & Allen to make this affidavit in its behalf and for the purposes herein set forth, and he does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him for and in behalf of said Henry & Allen are true.

GORDON W. ALLEN.

Subscribed and sworn to before me this 23d day of October, 1903.
[NOTARY SEAL.] LUCIA L. MILLER,
Notary Public.

Endorsed: No. 599. In the United States District Court for the Northern District of Illinois, Northern Division. In re Acme Harvester Company, Bankrupt, in Bankruptcy. Creditors' Petition. Filed in the office of the Clerk of the District Court, Oct. 23, 1903, at 4:02 o'clock p. m., T. C. MacMillan, Clerk. Gann, Peaks & Haffenberg, Ashland Block, Chicago.

In the United States District Court for the Northern District of Illinois, Northern Division.

27 I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the original petition filed in said court on Oct. 23, 1903, in the mat-er of Acme Harvester Company, a corporation, bankrupt as the same appears from the original now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said District, this twenty-eighth day of December, A. D. 1903.

T. C. MACMILLAN, *Clerk.*

[Seal District Court U. S., Northern District Illinois, 1855.]

"EXHIBIT E."

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the District Court of the United States for the Northern District of Illinois.

No. 599.

In the Matter of THE ACME HARVESTER COMPANY, Alleged Bankrupt.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

Our petitioner, the Acme Harvester Company, respectfully represents that the Beekman Lumber Company, a creditor of this Company to the amount of about Sixteen Hundred Dollars ($1600), brought an attachment suit which is founded upon a claim (from which a discharge would be a release) on December 7, 1903, in the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, and which is numbered 16625.

Your petitioner further shows that recently garnishment papers were issued on said attachment suit and served upon parties and institutions in Kansas City, and among others on the Union National Bank of Kansas City, Missouri, in which your petitioner has about Fourteen Hundred Dollars ($1400) on deposit; that said
28 garnishments are returnable to the October term, 1904, of said court at Kansas City.

In view of the premises your petitioner prays that an order may be entered herein staying and enjoining said Beekman Lumber Company from the further prosecution of said suit and for such other and further relief as your petitioner may be entitled to.

ACME HARVESTER COMPANY,
By S. D. PORTER, *Manager.*
NEWMAN, NORTHRUP, LEVISON & BECKER, *Attorneys.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

STATE OF ILLINOIS,
County of Cook, ss:

Samuel D. Porter being first duly sworn deposes and says he is the manager of the Acme Harvester Company, the petitioner in the above and foregoing petition; that he has read the said petition, knows the contents thereof and that the same is true.

SAMUEL D. PORTER.

Subscribed and sworn to before me this 24th day of September, A. D. 1904.

[SEAL.]

A. M. DEMPSEY,
Notary Public.

Endorsed: Gen. No. 599. U. S. District Court. In re Acme Harvester Co., Alleged Bankrupt. Petition for Injunction. Filed Oct. 3, 1904, at 10 o'clock a. m. T. C. MacMillan, Clerk. Law Offices of Newman, Northrup, Levinson & Becker, Chicago.

In the United States District Court for the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the petition of Acme Harvester Company for a staying order as same appears from the original filed in said court on the third day of October, A. D. 1904 and now remaining in my custody and control.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District,
29 this twenty-seventh day of October, A. D. 1904.

T. C. MACMILLAN, *Clerk.*

[Seal Dist. Court U. S., Northern Dist. Illinois, 1855.]

"EXHIBIT F."

In the District Court of the United States for the Northern District of Illinois, Southern Division.

MONDAY, *October* 2, 1904.

By Direction of Hon. Christian C. Kohlsaat, District Judge.

No. 599.

In the Matter of THE ACME HARVESTER COMPANY, Alleged Bankrupt.

This cause coming on to be heard on the petition of the Acme Harvester Company, and it appearing to the court that the prayer of said petition should be granted, and the court having duly considered said petition and heard the arguments of counsel.

It is ordered, that said Beekman Lumber Company of Kansas City, Missouri, be, and it is hereby restrained and enjoined, until the further order of this court, from the further prosecution of the suit now pending in the Circuit Court of Jackson County, Missouri, No. 16625, in which said Beekman Lumber Company, is plaintiff and said Acme Harvester Company is defendant.

In the District Court of the United States of America for the Northern District of Illinois, Southern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America, for the Northern District of Illinois, do hereby certify

the above and foregoing to be a true and correct copy of the restraining order entered in said court on the third day of October, A. D. 1904, in the matter of the petition in bankruptcy against the Acme Harvester Company as the same appears from the original records now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Peoria, in said District and Division, this twenty-seventh day of October, A. D. 1904.

T. C. MACMILLAN, *Clerk*,
By F. C. HOWE, *Ch. Dep.*

[Seal of Dist. Court U. S., Northern Dist. Illinois, Southern Division, 1887.]

Defendant here rested.

Testimony in Rebuttal.

Mr. TAYLOR: In rebuttal I desire to offer certain printed documents relating to the bankruptcy proceedings.

G. H. LOWRY, recalled as a witness on the part of plaintiff, further testified as follows:

Direct examination by Mr. TAYLOR:

Q. I hand you some printed circulars, headed "Office of Creditors' Committee Acme Harvester Company," and ask you if you know anything about those, where they come from?

A. Yes, sir; I know all about them.

Q. Look at letter of December 2, 1903, purporting to be signed by H. C. Stone, and I will ask you if you know anything about that?

A. Yes, sir.

Q. That letter is directed to you?

A. Yes, sir.

Q. Was received by you?

A. Yes, sir.

Mr. STEWART: Plaintiff offers that in evidence.

Said letter was marked by the stenographer "Exhibit G" and is in words and figures as follows, to-wit:

"EXHIBIT G."

W. H. Binnian, Pres't. O. J. Hastings, Sec'y & Treas.
H. C. Stone, Vice-Pres't. F. W. Stith, Sales Manager.

Established 1860. Incorporated 1880.

Acme Harvester Company, Manufacturers of Agricultural Implements.

PEORIA, ILLINOIS, *Dec.* 2, 1903.

G. H. Lowry, c/o Beekman Lbr. Co., Kansas City, Mo.

DEAR SIR: The writer sees from our records that you have
31 not as yet signed the Credit Committee Agreement, whereby the affairs of this Company are to be placed in the hands of five gentlemen for the purpose of working up our assets and gradually liquidating our indebtedness. You may not be aware that U. S. Judge Kohlsaat has stopped the matter of any one bringing suit against this Company, or endeavoring to throw it into bankruptcy, he having decided that we are solvent, and that the only reasonable and fair way to handle the business, paying its debts, etc., is through the medium of the Credit Committee, selected by our heaviest creditors. This being the case the only basis on which your claim will receive recognition is by joining with the balance of our creditors, signing the agreement, thus putting yourselves on record that you are a creditor and are entitled to such dividends as from time to time the committee might declare.

We sincerely trust that without further delay you can see your way clear to sign and mail the agreement to Mr. D. R. Forgan, at Chicago, so that everything will be in proper working order and every claim listed for consideration. It will not be a great while before under the management of the committee, we will again be in the market for raw materials, and at that time, as heretofore, we will take pleasure in having you figure on supplying at least a proportion of our requirements. Kindly let us hear from you relative to this matter by return mail, and oblige,

Yours very truly,

ACME HARVESTER CO.,
By H. L. STONE."

Q. State whether or not that letter was received by you? (Handing letter to witness.)

A. Yes, sir.

Plaintiff offers that in evidence, being letter of November 2, 1903, signed Newman, Northrup, Levinson & Becker, attorneys of record in this case for the defendant, which letter was marked by the stenographer "Exhibit H" and is in words and figures as follows, to-wit:

32 "EXHIBIT H."

"Newman, Northrup, Levinson & Becker, Attorneys and Counselors, Chamber of Commerce Building.

Jacob Newman, Salmon O. Levinson, Benjamin V. Becker, Harry Goodman, Arthur B. Schafnner.

CHICAGO, *Nov. 2d,* 1903

Beekman Lumber Co., Kansas City, Mo.

GENTLEMEN: Your favor of the 31st ult. in the Acme Harvester Co. matter duly received.

As we wrote you, it is not practicable at this time to attempt to pay off the merchandise creditors, whose claims aggregate, as we are informed, over $200,000.

The paper of the Acme Harvester Company was sold by a number of brokers all over the Western country, so that the money creditors are represented by perhaps 125 banks, with amounts ranging from $3,000 up to $20,000, and as high as $60,000 in a single bank.

As business men you will recognize at once the futility of attempting to get these miscellaneous and numerous money creditors to advance sufficient sums to pay off in advance the merchandise creditors. The Creditors' Committee is proposing to take such steps as will inure to the benefit of all creditors. An overwhelming majority of the creditors have already signified their approval of the plan and have executed and forwarded the agreements, and we trust you will kindly do so by return mail.

Yours very truly,

NEWMAN, NORTHRUP, LEVINSON & BECKER,

Per S. O. L.

Plaintiff offers in evidence the printed circular referred to dated October 26, 1903, which was marked by the stenographer "Entitled I."

Defendant objects to the offer for the reason there has been no proper identification of the printed circular in any manner or form.

33 The court sustained the objection.

Q. State how that came into your possession?
A. That was received by mail from the Creditor's Committee.
Q. Just as these other circulars which you refer to were?
A. Yes, sir.

Plaintiff offered in evidence the paper above referred to, marked "Exhibit I" which relates to the bankruptcy proceedings.

Defendant objects to the offer for the reason no proper identification has been made and no proof has been given as to who the

Creditors' Committee are or where they are, or anything about it; it does not prove itself.

The court overruled the objection; to which ruling of the court defendant then and there duly excepted.

Said paper "Exhibit I" is in words and figures as follows, to-wit:

"EXHIBIT I."

OFFICE OF CREDITORS' COMMITTEE,
ACME HARVESTER COMPANY,
CHICAGO, *October* 26, 1903.

To the Creditors of the Acme Harvester Company.

GENTLEMEN: In our letter of October 24 we advised that a certain law firm of this city had caused a petition in bankruptcy to be filed against the Acme Harvester Company, and made an application for the immediate appointment of a receiver.

We are pleased to report that the motion for a receiver was heard this morning by the Honorable C. C. Kohlsaat, Federal Judge, in Chicago, who refused to appoint a receiver and said:

"This estate is a very large one, and is in the hands of a committee of reputable creditors. It is my judgment that the creditors ought to manage and control the estate. The creditors can produce results much better than any receiver in handling a large manufacturing concern like the Acme Harvester Company."

A full account of what occurred in court is published in all the Chicago evening papers, from which the above remarks are quoted.

At the close of the argument the court referred the matter
34 to Judge David McCulloch, Referee in Bankruptcy at Peoria, to inquire into the truth of the allegations of the petition and to ascertain whether the petitioning creditors have any standing or right to file a petition in bankruptcy.

There is really only one creditor left in the bankruptcy proceeding, although persistent efforts have been made by the lawyers to get other creditors to join.

Respectfully,

D. R. FORGAN,
FERD LUTHY,
A. G. BECKER,
G. H. BURR,
MARTIN KINGMAN,
Creditors' Committee.

Plaintiff offers in evidence the circulars referred to by Mr. Lowry, which were marked by the stenographer, respectively, Exhibits J-1, J-2, J-3, J-4, J-5, J-6, J-7 and J-8.

Which offer is also objected to by defendant for the reason that no proper identification has been made of these circulars.

By the COURT:

Q. Where did you get those circulars, Mr. Lowry?
A. We received them by mail.

By Mr. TAYLOR:

Q. From whom?
A. From the creditors.

By the COURT:

Q. From where?
A. They were mailed from the Creditors' Committee office in Chicago.

The court overruled the objection; to which ruling of the court defendant then and there duly excepted.

Said circulars, being Exhibits J-1, J-2, J-3, J-4, J-5, J-6, J-7, J-8 are, respectively, in words and figures as follows, to-wit:

"EXHIBIT J-1."

OFFICE OF CREDITORS' COMMITTEE,
ACME HARVESTER COMPANY,
CHICAGO, *April* 1, 1905.

To the Creditors of the Acme Harvester Company.

GENTLEMEN: We mailed you on February 18th papers in
35 the Acme Harvester Company matter calling your especial attention to the proposed re-organization of the Company. We have received replies from about two-thirds of the creditors, about eighty per cent. of whom desire stock, and the rest prefer to accept fifty per cent. in cash. We have not heard from you, and we trust you will facilitate the re-organization by advising us at your earliest convenience of your choice between stock and cash. You will appreciate the fact that the plans are impeded by the delays in answering.

Please address D. R. Forgan, Vice-President, First National Bank, Chicago, Illinois, or Ferd Luthy, President, Merchants National Bank, Peoria, Illinois.

Yours very truly,

DAVID R. FORGAN,
FERD LUTHY,
A. G. BECKER,
GEO. H. BURR,
Creditors' Committee.

"EXHIBIT J-2."

OFFICE OF CREDITORS' COMMITTEE,
ACME HARVESTER COMPANY,
CHICAGO, *February* 18, 1905.

To the Creditors of the Acme Harvester Company.

GENTLEMEN: We herewith make the following report:

1. We enclose printed copy of the report of the Acme Harvester Company, presented to his Honor, Judge Kohlsaat and filed in the Federal District Court on the 15th day of February, 1905. This report will give you a detailed statement of assets and liabilities:

2. We also enclose printed copy of a letter received from Samuel D. Porter, the General Manager of the Company. This letter presents the difficulties that have surrounded the work during the past year and also the plans for the future.

3. In our letter to you of February 14, 1904, we expressed the hope that we would be able to pay a dividend at the close of the season. A careful examination of the report and letter herewith
36 enclosed, will convince you, as the facts have convinced us, that not only is it inadvisable at this time to pay a dividend, but to do so might seriously cripple the business as a going concern and thus endanger the fair and reasonable expectation of paying the creditors in full, or the greater part of their claims. The money we have on hand and collections during the manufacturing season will be needed to manufacture the output of 15,000 machines, market and sell them. We have endeavored to carry on the work with economy. Not a dollar of compensation has been paid to the committee or to its attorneys. The committee, representing as it does in itself over two-thirds of the total indebtedness of the company, regrets the inability to pay a dividend at this time, but confidently justifies its action on the ground that to do so might prove hurtful to the best interest of the creditors.

4. The committee has endeavored to work out some plan so that the Company may conduct its business free from debt and be able to hold its own with its competitors. Various plans of re-organization have been presented and discussed, and the committee has given this subject much thought.

5. We are of opinion that a re-organization on the basis of $2,000,000 capital stock, without any outstanding liabilities, would put the new Company in excellent position to carry on its business successfully and pay a substantial dividends on its stock of $2,000,000.

6. Possibly some of the creditors may prefer to settle their claims on a cash basis instead of accepting stock at par in the re-organized Company. To this end the reorganization plan contemplates the purchase of such claims at fifty cents on the dollar in cash to creditors preferring cash settlement. These purchasers in turn will take stock, so that the new company will be wholly free from debt.

7. We therefore ask you to advise us as soon as possible whether this proposed plan of reorganization meets with your approval, and whether you prefer stock for the face amount of your claim or cash at fifty cents on the dollar.

37 8. It is proper for us to say that the creditors whom we have seen approve the above plan of reorganization and prefer to take stock instead of the cash payment. The committee is desirous of pursuing a policy which will ultimately realize the most possible for the creditors.

9. In answering this letter address Mr. Ferd Luthy, Chairman of the Creditors' Committee, care of Merchants' National Bank, Peoria, Ill., or Mr. D. R. Forgan, care of First National Bank, Chicago.

10. Any further information will be gladly furnished.

11. We regret to report the recent death of Mr. Kingman, of Peoria, a member of this committee.

Yours very truly,

DAVID R. FORGAN,
FERD LUTHY,
A. G. BECKER,
GEO. H. BURR,
Creditors' Committee.

"EXHIBITS J-3 AND J-4."

Report Filed February 15, 1905, *in the Matter of the Acme Harvester Company.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Southern Division, ss:

In the District Court Thereof in Bankruptcy.

No. 599.

In the Matter of the Estate of ACME HARVESTER COMPANY, Alleged Bankrupt.

To the Honorable C. C. Kohlsaat, Judge of said Court:

The undersigned begs to submit herewith its report as to its acts and doings since the last report, showing all moneys received and expended, statement of assets and liabilities, facts concerning the conduct of the business and its conditions as of January 1, 1905.

I.

Statement of Assets.

Bills receivable	$ 279,480.33
Accounts receivable, including balance of account under South American contract	85,224.19
38 European accounts	14,000.00
Raw material (principally purchased for 1905 output)	86,023.56
Machines on hand and in the territory, reckoned at their present value	113,216.75
Machines in process of manufacture; taken at 60 per cent off of list price	238,672.97
Cash in bank	114,143.50
Repair parts on hand at general offices and agencies taken at 60 per cent off list price	238,328.55
Freight advanced and to be repaid for machines, etc., carried at agencies	5,091.47
Furniture and fixtures at agencies and general offices	3,099.95

Factory pay-roll expended in manufacturing machines for 1905 business on machines that are now in process of completion		19,660.43
Real estate, consisting of seven and a fraction acres in the city of Pekin and Acme Addition in South Bartonville, exclusive of factory site, at actual cash investment	34,497.49	
Less amount realized from sale of lands in 1904	9,628.50	
	$24,868.99	
Patterns at actual cost now in use in the factory		$147,825.05
Patents at prices paid for them, in actual current use in machines now being built		58,652.57
Factory, including factory buildings and working equipment of the factory, at actual cost of ground, buildings, and working equipment, hitherto valued at $650,000		458,460.75
Cost of securing actual written contracts of sale for 1905 delivery, amounting to $300,000, domestic business		36,408.30
Total		$1,923,157.36

39 Memo. A. It is to be noted that we have charged off to profit and loss from the old bills receivable $21,000, so that the above bills receivable represent actual good and collectible notes.

Memo. B. We have taken out of prior estimates of the value of the machines on hand January 1, 1904, machines and repair parts on hand, both at Peoria and at the agencies, on January 1, 1904, about $300,000.00. Several thousands of the machines that were represented by the old managers of the Acme Harvester Company to be *be* in good condition and to be salable at contract prices, were found either to be practically worthless or had to be sold at a small fraction on the dollar of regular prices. All of the machines now on hand, wherever located, have been shrunk to their actual value without regard to their regular selling price. Each machine has been valued at its own worth, depending on its condition and other attendant circumstances. It has been our endeavor during the past year to sell and dispose of all of the old, injured and unsalable products that had accumulated in the hands of the old managers. This we have done to such an extent that we have now on hand only about one-eighth of the machines, etc., handed over to us by the old managers. We start in on January 1st, 1905, with one-eighth of the old company's machines at their actual value, and all the rest of our output will be new goods sold at regular prices.

Memo. C. The repairs and extras on hand, both at the factory and in the territories, have been carefully checked over by experts and all obsolete and worthless extras and repairs have been separated and gray iron castings thrown into our scrap pile to be melted over

and made into parts that will be of value. Malleables and steel parts that were obsolete and worthless have been sold for junk. So that the repair parts now shown in our inventory are actually worth the value placed upon them.

Memo. D. Cash on hand as of January 1, 1905, as shown above, is $114,143.50. In addition to this, moneys to the amount of about $100,000.00, cash received during the year, have been expended for raw material which we purchased at bottom prices, and for catalogues, advertising, pay-roll and general expenses in manufacturing and selling. All of these items are chargeable to 1905 business, because we have already received orders to the amount of $350,000.00 actual written contracts of sale, and the moneys already expended will produce a large amount of additional sales. In addition to these moneys there has been collected and is now in the hands of the creditors holding security, the sum of $127,000; these creditors are under the orders and directions of this court.

Memo. E. You will note that the item of real estate is now $34,497.49. This amount has been shrunk from about $72,000, the value hitherto put upon this real estate. We have had this property subdivided and are now at work selling the lots, and you will observe by the above that we have already sold $9,628.50 of this property. The average price per lot for Pekin Subdivisions is about $500, and in South Bartenville from $100 to $150 per lot.

Memo. F. The factory site has been shrunk from the old valuation of $650,000, as per our last report, to the actual cost value of $458,460.75.

Memo. G. The cash for the year 1904 has been in part expended in the employment of men to locate machines and to attempt to sell machines that were lost track of in old records of the company, many of which produced little or no return. This caused unusual territorial expense which for the year 1904 totaled $197,000, and was largely due to the foregoing conditions. These have since been eliminated. It is the confident belief of the undersigned that the territorial expense for the year 1905 will be reduced from twenty-five to forty per cent, reckoned on the same amount of business.

II.

Statement of Receipts and Disbursements from January 1, 1904, to December 31, 1904, Inclusive. (See Our Last Report for Items in January, 1904.)

Receipts.

Total cash receipts from February 1, 1904, to December 31, 1904, inclusive	$927,217 84

Disbursements up to January 14, 1905.

Legal expense, principally to repay costs and expenses.	$1,052.34
Kansas City General Agency	25,406.96

Wichita General Agency	15,756.11
Omaha General Agency	15,524.94
Des Moines Agency	10,042.60
Fargo Agency	30,615.08
Aberdeen	14,235.10
Portland	1,650.00
Minneapolis	1,025.00
Illinois	4,575.08
Portland expense, commission on sales	11,518.00
Minneapolis expense, commission on sales	7,303.05
Huron expense, commission on sales	1,962.18
Kansas City expense, commission on sales	1,459.29
Fargo expense, commission on sales	2,819.51
Des Moines expense, commission on sales	2,562.47
Omaha	653.76
General Office Salaries	33,076.43
General Office Expense	4,494.85
General Office Traveling Expense	2,815.02
Chicago Office Expense	1,033.86
Shop Salaries and Pay Roll	107,745.89
So. American Exports, 1903 Account	2,432.35
So. American Exports, 1904 Account	3,408.41
Advertising	9,806.83
Materials and Supplies	171,689.91
Freight	31,637.18
Catalogues	5,218.74
Printing	5,531.38
Hooven & Allison—Twine	3,501.02
Commission and Refunds	1,939.51
Insurance	5,336.57
Taxes, Real and Personal	1,206.53
Devenish Hardware Co.—Judgment	958.02
Exchange	229.06
Real Estate—Mortgage—Interest and Expense	5,130.01
J. P. Cummings—Well Contract	53.00
42 Barker Case—Compromised	1,460.83
Expense Investigation European Contract	600.00
Discount	15.46
Furniture Account—Peoria	224.00
Furniture Account—Chicago	228.27
Harvester King Co.—Exchange	6.95
Harvester King Co.—Commission Certificates	11.94
Interest on Special Loan	3,684.62
Special Loan for So. American Contract	175,000.00
Cash in Bank January 14, 1905	104,434.04
Cash in Drawer, January 14, 1905	150.98
Cash in Chicago Office	1,081.79
Moneys collected and held by secured creditors	94,912.92
	$927,217.84

III.

Sales for 1905.

There have been sold on written sales contracts up to January 20, 1905, $350,000, reckoned at the net selling price of the machines. These are all domestic sales. In addition to this, we have been assured of the renewal of the South American contract which we have had for many years, which will be in the neighborhood of 300,000. Last year up to January 20, 1904, we had sold not to exceed $50,000 of machines for domestic delivery, so that we have now sold about $300,000 more than last year. We will have no difficulty in selling our entire output for the season for 1905 and obtaining the regular selling price therefor. Our goods are in great demand and our machines give satisfaction wherever used.

IV.

Prospective Profits for the Year 1905.

Inasmuch as we now have the assets and the business in good commercial condition, we can with conservatism and safety estimate the results of the operations for the coming year, 1905, barring only a general crop failure. We estimate that our net profits for the business of 1905 will be not less than $200,000, and possibly in excess of $250,000. This can be done if the present assets are
43 left intact and can be used as capital for the purpose of running the business.

V.

South American Contracts.

We have again secured the South American contract, which in its entirety amounts to about $300,000. They write us that their last year's orders were filled to their utmost satisfaction, and that they have sold out their entire purchases. This makes our total sales to date over $650,000.

VI.

Side Lines.

We have already sold twine (which is done at a commission without expense to the undersigned company) which will realize to the creditors a net profit of $15,000. This is reckoned on sales already made. It is expected that the entire commissions on twine will be not less than $30,000 for the year 1905.

VII.

Liabilities.

Since the new management came in the undersigned has settled and adjusted sundry litigations, claims and judgments, had one judgment for $20,000 against the company reversed and disposed of and has reduced the secured claims as shown in this and the former report; so that the liabilities of the Acme Harvester Company at the present time do not exceed the sum of $1,790,000. These claims, amounting to $1,790,000, are unsecured and are entitled to participate equally in the assets, business and profits of the company as above set forth.

In this statement we have eliminated securities held by secured creditors from our assets and have deducted the value of such securities from the amount of the claims of such secured creditors.

Respectfully submitted,

THE ACME HARVESTER COMPANY,
By SAMUEL D. PORTER,
Its General Manager.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
Attorneys.

STATE OF ILLINOIS,
County of Cook, ss:

Samuel D. Porter, being first duly sworn, deposes and says that he is the General Manager of the Acme Harvester Company;
44 that he signed the above and foregoing report and knows the contents thereof and that the same is true.

(Signed) SAMUEL D. PORTER.

Subscribed and sworn to before me this 15th day of February, A. D. 1905.

(Signed) A. K. DEMPSEY,
Notary Public.

"EXHIBIT J—5."

Letter From Manager to Committee of Acme Harvester Company.

OFFICE OF ACME HARVESTER COMPANY,
ROOM 1030 FIRST NATIONAL BANK BUILDING,
CHICAGO, *January* 27, 1905.

To the Creditors' Committee of the Acme Harvester Company.

GENTLEMEN: We beg to submit statement of the affairs of the Acme Harvester Company since I became manager.

When through your committee the writer took charge of the Acme Harvester Company's affairs as general manager, January 18th, 1904, we were confronted with a condition of affairs generally which it would be next to impossible to convey to you by letter.

Operations in all departments at the factory and general agencies had ceased. A large number of the best men on the force had already sought and secured employment elsewhere. A great number of the settlements of the 1903 business had not been closed. Several thousand machines were scattered over the Central West in the hands of dealers and farmers, and the records kept of these machines were very incomplete, in many cases misleading. Some instances showed more machines on hand at country agencies than were actually there; at other points we found occasionally more on hand than the records showed belonged to us. Our old records uniformly indicated that the machines on hand at our general agencies, and in the hands of our local customers were in good condition. The facts were that large numbers of these machines, instead of being good, new, bright machines of the manufacture of
45 either the years of 1902 or 1903, had been on hand for a number of years. Many of them had been poorly housed, in some cases not stored under a roof at all, left lying in the back yards of the country implement dealers. Many machines had been sold to farmers, and promises impossible to perform made. The result was, that a machine which showed on our records as in a local agent's warehouse in good condition, was in the country in the hands of some farmer who had cut a portion or all of his 1903 crop and refused to settle for the machine on any basis. This state of affairs to a more or less extent existed all over some half dozen general agencies, being much worse in Kansas where our trade is large, than in any other agency. In one traveler's territory alone in Kansas, there were one hundred and thirty-two (132) of just such cases. Hundreds of machines which the old records showed to be in first class condition, were second-hand, condemned and often absolutely worthless.

So much for the condition of the goods which we were expected to sell, and which we were also expected to get full price for.

The Collection Department had become disabled by neglect. There was not a traveling collector on the force and had not been for months. There was no systematic records kept of collections. Notes were allowed to mature and rift along and large amounts of money had been allowed to pass maturity, become doubtful or worthless, for the reason that it was nobody's particular business to keep track of this most important department. We have reorganized the collection department and have it in charge of a competent party. The collections are now being intelligently and vigorously handled with satisfactory results.

We are pleased to advise you that we have located the scattered machines and sold seven-eighths of them for the best price possible. We believe we have made what might be termed an absolute clean-up, so that the old assets are now converted into collectible notes or accounts, or the few machines still unsold, housed in some
46 implement dealer's warehouse. We hold his receipt for this machine, with a definite price fixed which our company expects to receive for it during the year 1905.

We have made a careful inventory of the extras on hand at the

factory, and scattered over the territories. The grey iron castings — were obsolete, we have put into our scrap pile for the purpose of melting over. Other extras which were worthless, we have sold for junk.

As the result of the year's work I can confidently assure you that the affairs of the Acme Harvester Company today are in a good, clean and prosperous condition.

The statement furnished your committee showing over $1,900,000 actual assets is conservative. The factory and equipment are today in good, first-class condition. The plant is especially well located for the manufacture of machinery. Being situated outside of the city limits of Peoria, the rate of taxation is low; having both the P. & P. U. and the P. and P. T. terminal railroads running by and into our own yards, we have excellent switching facilities. We have our own artesian flowing water; coal from a mine eighty rods from our factory at a minimum charge; insurance one-fourth of that paid by some other factories in the same line of business. We are not confronted with labor difficulties at all.

The Acme Harvester Company has hitherto sold on consignment contracts, that is, the company carried goods (frequently for years) until they were sold. This required immense capital, as a great many machines were carried over from year to year. Believing that by proper handling we ought to sell our entire output under a straight sale contract, we made the effort, and the results have been much better than we had hoped. We have already sold to responsible implement dealers for 1905 delivery, machines of all kinds, amounting to more than $350,000. At this time last year we had secured consignment contracts for perhaps $50,000. We shall therefore sell our entire output on straight sales contracts. The
47 South American Contract for this year amounts to about $300,000 in addition, making total sales to date of $650,000.

We are handling twine on a commission basis, and have already sold twine, in which we have a commission payable in the fall of 1905, of something near $15,000.00. We expect to make $30,000.00 in this way during 1905, without additional expense.

We have experienced no difficulty whatever in competition with the Trust. Large numbers of the very best implement dealers are opposed to combinations and trusts, and the sentiment of the farmers is uniformly with us. In a great many instances we have been solicited to sell our goods to dealers, thereby securing valuable business without any expense whatever.

A word regarding the methods of conducting the business. Now, under straight Sale Contract we will be able to reduce the selling expense materially. We will not furnish canvassers to solicit trade among the farmers, as was the case under the old consignment contracts, when we were compelled to have a large force of canvassers or machine salesmen to solicit business under each general agency. Heretofore for three or four months in the spring and summer we had to have from twenty to fifty such employés at each general agency, the number varying according to the volume of business and the kinds of machines sold. These men and this expense are

unnecessary under a sale contract. We will reduce the selling expense in this way from 25 per cent to 40 per cent. Under the straight sale contract, at the close of the season, we will have no manufactured goods in the hands of country dealers at all. We will have only a minimum amount to carry over, and these will be in our own warehouses, either at the factory or our general agencies. Our force of general agents and travelers is now made up, all experts in their line; all of them having been for years employed with some one of the old companies which went into the trust. We have thus secured thoroughly competent men who already understood the harvesting machine business without necessitating our educating them at our expense.

Regarding the quality of the machines manufactured by
48 the Acme Harvester Company, particularly those manufactured the past year under the direction of your Committee, we are more than pleased to state that they are justly entitled to their name, "Acme" machines. We have hundreds of testimonials from farmers who purchased machines of us the past year, proving the above statement. The satisfaction given the past year by our machines in the harvest field, has itself been a great advertisement for us. Being independent and so understood to be, is also an unquestionable advantage for us. I feel able with a degree of safety to estimate the net profits for 1905. With our output limited to 15,000 machines, we expect to sell them all at regular prices. Figuring the cost of the machines and all the expenses of the business, we shall show net profits for 1905 not less than $200,000.00. This money at the close of the year, can be with perfect safety distributed among the creditors as dividends, or among the stockholders as dividends on stock certificates, without in any way impairing the working capital of our company. In fact, it is our firm belief, that if we were reorganized and the creditors took stock for their claims, we could pay as good dividends as any concern in our line of business. It would be perfectly safe to fix this dividend at 6 per cent per annum, as we can and will, with perfect safety, go above this. I am satisfied that within a comparatively short period stock in the new company would be worth on the open market par or above.

With this condition of affairs before us, we do not hesitate to recommend that the Acme Harvester Company be reorganized, issuing capital stock for two million dollars, creditors accepting stock for their claims at par. If this is done, I am confident the creditors will receive 100 cents on the dollar in cash with interest. We have a sufficient amount of capital to conduct the business as it is now running, and assure a dividend of 6 per cent on this capitalization.

Respectfully submitted,

SAMUEL D. PORTER, *Manager.*

49 "EXHIBIT J—6."

Agreement.

Agreement between the Acme Harvester Company, first party, the Undersigned Creditors of the Acme Harvester Company, second party, and W. E. Stone, (executor of the W. E. Stone estate), George H. Stone, H. C. Stone, H. E. Hardin, O. J. Hastings and W. H. Binnian, constituting all the stockholders of the Acme Harvester Company, third party, as follows:

1. D. R. Forgan, vice president of the First National Bank of Chicago; Ferd Luthy of Luthy & Company, Agricultural Implements, Peoria; A. G. Becker, of A. G. Becker & Company, Chicago; G. H. Burr, of Steere & Burr, Boston, and Martin Kingman, of Kingman & Company, Agricultural Implements, Peoria, are hereby appointed a Creditors' Committee of five (5) to represent the undersigned creditors in and about the business and affairs of the Acme Harvester Company, in such way and manner as the committee may deem for the best interests of the creditors; but said committee shall not have the power to make any assessment or create any personal liability against the undersigned creditors. All vacancies in the Creditors' Committee caused by death, resignation, or otherwise shall be filled by the unanimous vote of the remaining members.

2. The above named stockholders of the Acme Harvester Company shall assign and deposit their shares of stock with said Creditors' Committee in such form as the committee may deem advisable and give said committee an irrevocable power of attorney to vote all their shares of stock at any and all stockholders' meetings, or otherwise; which power of attorney and power to vote shall continue and be irrevocable until the debts of the undersigned creditors of the Acme Harvester Company have been paid in full.

3. The directors and officers of the Acme Harvester Company shall resign their respective offices when requested so to do by the Creditors' Committee, and the commitee shall at all times have the power to elect the board of directors of the Acme Harvester Company, and designate who shall act as such directors until all the debts of the undersigned creditors have been paid in full;
50 and when so paid in full, said shares of stock shall be delivered and surrendered to the owners thereof.

4. The directors, under and with the authority of the Creditors' Committee shall have power, in running and operating the business of the Acme Harvester Company and conserving its property, to make such payments and adjustments, settle all such litigation now existing or hereafter begun which may affect the Acme Harvester Company, or its property, or business, and do all such things, as said directors may deem necessary for the preservation and protection of the company's property, business and good-will, and as they may deem best for the protection of the interests of the undersigned creditors.

5. All the creditors signing this instrument shall deposit with the Creditors' Committee all their notes, claims, demands and evidences of indebtedness duly assigned in blank, which they may have or hold against the Acme Harvester Company; and the Creditors' Committee shall hold the same when so deposited and issue a proper receipt therefor to the creditors making such deposit. After making such deposit, no suit or other proceeding shall be begun, or prosecuted by any creditor on such notes, claims, demands and evidences of indebtedness, so long as this agreement and its provisions remain in force.

6. The directors, under and with the authority of the Creditors' Committee, shall run and operate the company, and out of the assets of the company pay the claims of the undersigned creditors in full as rapidly as the business will permit. All payments to be made to the undersigned creditors in proportion to their respective claims.

7. This agreement shall be binding and become operative as soon as creditors to the amount of One Million Seven Hundred Thousand Dollars have signed the same and the Creditors' Committee declare the agreement operative; and as soon as they have made such declaration, the Creditors' Committee shall give notice of same to the undersigned creditors.

8. The Creditors' Committee shall exercise their best judg-
51 ment in the discharge of their duties hereunder and shall not be liable except for the performance of their duties in good faith.

9. This instrument and all duplicates thereof when signed, shall be construed and taken as one instrument.

Dated at Chicago, Illinois, October 19, 1903.

——— ———.

Amount of all claims $—.

"EXHIBIT J—7."

Office of Creditors' Committee Acme Harvester Company.

CHICAGO, *October* 19, 1903.

To the Creditors of the Acme Harvester Company:

1. Your attention is respectfully called to the present condition of the Acme Harvester Company, of Peoria, Illinois. The indebtedness of the company is maturing so rapidly that it will not be able to take care of its obligations as they become due, and therefore it behooves the creditors to adopt some prompt method by which this extensive and valuable business may be conserved for their benefit.

2. The necessity of speedy action made it impracticable to call a meeting of all the creditors, and therefore some of the larger creditors met at Chicago last Saturday, October 17, to canvass the situation and adopt some plan to be speedily submitted to the company's creditors. At this meeting there were present creditors hold-

ing claims to the amount of over one million five hundred thousand dollars, who have approved the plan adopted by the committee and herewith submitted to you for your approval and signature.

3. The meeting investigated the Acme Harvester Company's financial condition, and from the material at hand reached the conclusion that the company was and is solvent, and, if its property be carefully and conservatively handled, would pay its creditors in full without difficulty. At the meeting the officers of the company presented a statement of its assets and liabilities. This statement was carefully analyzed and compared with the results of an independent investigation made by one of the largest creditors at his own expense. Taking the two reports together the committee made an estimate
52 of the company's assets and liabilities, and we herewith enclose the same. This estimate the committee believes fairly represents the present condition of the company. In making this estimate the meeting endeavored to scale down all along the line and to get things down to rock bottom.

4. The Acme Harvester Company is engaged in a business different in many essential features from the ordinary manufacturing business. Its product is sold largely to farmers on long terms of credit, and its sales are practically all made during one season of the year.

5. The company's property, in addition to a fully equipped modern plant, consists of unfinished machines, finished machines, raw material, bills receivable, and outstanding accounts, three-fourths (¾) of the latter for machines sold this year. In order to get the utmost out of these assets it is essential that the machines in process be completed and sold, and the accounts receivable carefully, prudently and promptly collected. The ability to sell, during the coming season, machines on hand and to be completed, and the satisfactory collection of outstanding accounts, will be greatly enhanced by the Acme Harvester Company being known to the trade, and in fact, a going concern.

6. In the judgment of the committee nothing could be more disastrous than the appointment of a receiver and the enormous waste, expenses and long delays incident to all legal proceedings. The lawyers and the courts would be chiefly benefited by such action. This property belongs to the creditors and they themselves ought to handle it for their own benefit.

7. From the present outlook the committee believes that a liberal payment on account of the indebtedness could be made to creditors within three or four months from this date, as the season is at hand when collections are made.

8. The creditors at this meeting appointed the undersigned as a Creditors' Committee, to take charge of the company's affairs and outline a plan by which the interests of the creditors would be conserved and their claims paid as speedily as possible. Accordingly the committee has adopted a plan which places the property
53 under the control of the creditors, and we herewith enclose the agreement to be signed by you and returned immediately

to the Creditors' Committee, care of D. R. Forgan, First National Bank, Chicago.

Yours truly,

D. R. FORGAN,
Vice-President First National Bank of Chicago.
FERD LUTHY,
Of Luthy & Co., Agricultural Implements, Peoria.
A. G. BECKER,
Of A. G. Becker & Co., Chicago.
G. H. BURR,
Of Steere & Burr, Boston.
MARTIN KINGMAN,
Of Kingman & Co., Agricultural Implements, Peoria.

"EXHIBIT J—8."

Office of Creditors' Committee Acme Harvester Company.

CHICAGO, *October* 24, 1903.

To the Creditors of the Acme Harvester Company.

GENTLEMEN: We have, within five days from the time the agreements were sent out to creditors, received signed agreements from one-half in number and two-thirds in amount of the creditors. Not only have they executed the agreement, but numerous letters have been received from the creditors endorsing and commending the plan as best for all concerned.

A petition in bankruptcy was filed today by a law firm of this city claiming to represent three claims, for the purpose of throwing the company into bankruptcy. One of the three creditors, as soon as he learned the purpose of the attorneys, repudiated their action and withdrew from the bankruptcy proceedings. If successful, this proceeding would wreck the company, destroy its business, make the collection of outstanding accounts difficult, and sacrifice the value of the assets. Every creditor knows what bankruptcy proceedings mean to the assets, business and good will of a manufacturing concern.

We feel confident that the court will deny the application
54 for a receiver and leave the business in the hands of the creditors. We write so you may know the actual facts and join the overwhelming majority of creditors in carrying their plan into effect.

If you have not already signed and forwarded the agreement, we trust you will do so immediately upon receipt of this letter. If there is any reason why you should not sign the agreement, or if you have any suggestions to make, kindly communicate with us at once.

Yours very truly,

D. R. FORGAN,
FERD LUTHY,
A. G. BECKER,
G. H. BURR,
MARTIN KINGMAN,
Creditors' Committee.

Plaintiff here rested.

This was all the evidence offered and introduced in the trial of this cause.

Whereupon at the request of plaintiff the court gave the following peremptory instruction:

"The court instructs the jury that under the pleadings and evidence your verdict must be for the plaintiff in the sum of fifteen hundred and eighty-seven and 52-100 ($1,587.52) dollars."

To the giving of which peremptory instruction on the part of plaintiff, defendant then and there at the time duly excepted.

And under the pleadings and the evidence and the peremptory instruction given as aforesaid the jury returned the following verdict:

Verdict.

We the jury find for the plaintiff and assess its damages at the sum of fifteen hundred and eighty-seven and 52-100 ($1,587.52) dollars.

M. H. GRIFFITH,
Foreman.

And afterwards, to-wit, on June 22, 1905, and within four days after the rendition of said verdict, defendant files its motion
55 for a new trial and its motion in arrest of judgment, which are respectively in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 16625.

BEEKMAN LUMBER COMPANY, Plaintiff,
vs.
ACME HARVESTER COMPANY, Defendant.

Now comes the defendant and moves the court to set aside the verdict and judgment in the above entitled cause, and to grant it a new trial for the reasons:

1. The court erred in admitting incompetent and irrelevant testimony in behalf of the plaintiff against the objections of the defendant.

2. The court erred in admitting any evidence on behalf of the plaintiff and against and over the objections of the defendant.

3. The court erred in instructing the jury in behalf of the plaintiff.

4. The court erred in instructing the jury on its own motion.

5. The court erred in refusing to instruct the jury as requested by the defendant.

6. The court erred in refusing to instruct the jury that their verdict must be for the defendant.

7. The court had no jurisdiction to try said cause or to render said judgment.

8. The verdict and judgment are against the evidence and the weight of the evidence.
9. On the pleadings and the evidence the verdict and judgment should have been for the defendant.

KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

Endorsed: Filed June 22, 1905. H. G. Henley, Clerk. M. J. Pendergast, Deputy Clerk.

56 In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 16625.

BEEKMAN LUMBER COMPANY, Plaintiff,
vs.
ACME HARVESTER COMPANY, Defendant.

Now comes the defendant and moves the court to arrest the judgment in the above entitled cause, for the following reasons:
1. On the face of the record the court had no jurisdiction to try said cause or to render any judgment therein.
2. On the face of the record said judgment is erroneous.
3. On the face of the record the judgment should have been for the defendant.
4. The petition did not state facts sufficient to constitute a cause of action.

KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

Endorsed: Filed June 22, 1905. H. G. Henley, Clerk. M. J. Pendergast, Deputy Clerk.

And afterwards, to-wit, on Saturday, July 15, 1905, the defendant's motion for a new trial and defendant's motion in arrest of judgment were each by the court overruled; to which action and ruling of the court defendant then and there duly excepted.
And now comes defendant and files affidavit for appeal, which is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 16625.

BEEKMAN LUMBER COMPANY, Plaintiff,
vs.
ACME HARVESTER COMPANY, Defendant.

Defendant prays the court to grant it an appeal herein to the Supreme Court of Missouri.

KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

57 STATE OF MISSOURI,
County of Jackson, ss:

Edwin A. Krauthoff being duly sworn upon his oath states that he is one of the agents and attorneys for defendant and as such makes this affidavit; the appeal prayed for is not taken for vexation or delay but because affiant believes the appellant is aggrieved by the judgment and decision complained of.

EDWIN A. KRAUTHOFF.

Subscribed and sworn to before me July 15, 1905.

H. G. HENLEY, *Clerk*
M. J. PENDERGAST,
Deputy Clerk.

Endorsed: Filed July 15, 1905. H. G. Henley, Clerk, M. J. Pendergast, Deputy Clerk.

Which appeal is by the court allowed to the Supreme Court of Missouri. And defendant files bond in the sum of three thousand five hundred dollars ($3,500) with American Surety Company of New York as surety, which bond is by the court approved.

And defendant has *to* on or before November 1, 1905, to file its Bill of Exceptions.

Comes now the defendant, Acme Harvester Company at the October Term, 1905, of the Circuit Court of Jackson County, Missouri, and presents the foregoing to the Hon. W. B. Teasdale, judge of said court and prays him to allow and sign the same as its true Bill of Exceptions to the acts and rulings of the court hereinbefore recited.

Now, therefore, the undersigned judge of the Circuit Court before whom said cause was pending and said proceedings were had, being fully advised in the premises doth find the foregoing to be a true bill of exceptions on behalf of said defendant, Acme Harvester Company, and doth sign and in open court doth order that the same be filed and be a part of the record in said cause.

58 Given under my hand at Kansas City, Missouri, this 12th day of October, 1905.

W. B. TEASDALE,
Judge of Division No. 3 of the Circuit Court of Jackson County, Missouri.

Approved:
STEWART TAYLOR,
Attorney for Plaintiff.

More than fifteen days before the second Tuesday in October, 1905, the defendant filed in this court a certified copy of the judgment and order allowing the appeal.

KARNES, NEW & KRAUTHOFF,
NEWMAN, NORTHRUP,
LEVINSON & BECKER,
Attorneys for Appellant.

59 Afterwards, to-wit, on the 15th day of December, 1907, there was filed statement and brief for appellant, which said statement and brief *is* in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1907, January Term, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Statement and Brief for Appellant.

Chronologically stated, the record in the case at bar presents the following state of facts:

1903, October 22. Petition in bankruptcy filed in the District Court of the United States for the Northern District of Illinois, Southern Division, against Acme Harvester Company. (Rec. pp. 17-21.)

1903, December 7. Action on an open account instituted in the circuit court of Jackson county, Missouri, by Beekman Lumber Company against Acme Harvester Company and an attachment sued out in that action. (Rec. pp. 1-3.)

60 1903, December 24. Motion filed to stay proceedings. This motion was sustained (January 11, 1904) and then on motion of defendant (filed March 30, 1904) the order staying the proceedings was on May 14, 1904, set aside. (Rec. pp. 3, 4.)

1904, June 2. An additional writ of attachment was issued in the case of Beekman Lumber Company vs. Acme Harvester Company and served on two garnishees. One of these garnishees never answered and the other did answer, admitting an indebtedness to the defendant in the action. (Rec. pp. 3-4.)

1904, October 3. The court in which the proceeding in bankruptcy had been filed against Acme Harvester Company did, on application of that company, (Rec. pp. 22, 23) restrain and enjoin the prosecution of the action so instituted as aforesaid by Beekman Lumber Company against Acme Harvester Company. (Rec. p. 24.) No application was ever made to have this order of injunction vacated or set aside, and so far as the record in this case is concerned (and such is the fact *dehors* the record) this order is still in full force and effect.

1904, October 12. Defendant in the case at bar filed an answer pleading the injunction issued in Illinois and denying generally the allegations of the petition. (Rec. p. 5.)

1905, June 20. Replication of plaintiff filed. (Rec. pp. 5, 6.)

The proceedings had at the trial will be noticed in the course of the brief.

61 *Assignments of Error.*

I.

The trial court erred in proceeding to a judgment in this case, there being pending at the time of the institution of this action, a proceeding in bankruptcy against defendant herein. Such proceeding was pending in a court of the United States and that court had enjoined the prosecution of this action. In so proceeding to judgment, and in ignoring such injunction, and in failing to give full faith and credit thereto, the trial court decided against the validity of a statute of and an authority exercised under the United States; and decided against a title, right, privilege and immunity claimed under the constitution and statutes of and authority exercised under the United States, which right, title, privilege and immunity is specially set up and claimed by the defendant herein.

II.

The trial court erred in peremptorily instructing the jury to find for the plaintiff.

III.

The trial court erred, in including in the instruction to the jury, a peremptory direction to include interest and in not leaving to the jury the calculation of the amount of the interest.

IV.

The trial court erred in the admission of evidence.

62 *Brief.*

I.

What is the effect of the proceedings in bankruptcy filed in a court of the United States as against an action thereafter instituted in a court of Missouri, one of the United States?

Primarily, it will be observed that the petition in bankruptcy against Acme Harvester Company was filed by creditors representing the requisite number and amount, there being three creditors, having provable claims against Acme Harvester Company and the sum of these claims is greater than $500. (Rec. pp. 17-21.)

Section 59, clause *b*, National Bankruptcy Law;
Loveland on Bankruptcy (Third Ed.) p. 1262.

The corporation is alleged to be engaged in the manufacturing business and is subject to the operations of the bankruptcy law.

Section 4, subdivision *b*, National Bankruptcy Law.

The court in which the petition was filed had jurisdiction to adjudge the corporation a bankrupt. See allegations of petition in bankruptcy as to the principal place of business of the corporation.

(Rec. p. 17.) Consult Section 2, subdivision 1, of the National Bankruptcy Law.

"The filing of the petition in bankruptcy was a caveat to all the world. It was in effect a caveat and an injunction. Thereafter all the property rights of the debtors were ipso facto in abeyance
63 until the final adjudication. * * * No matter where the property of the bankrupt estate may have its situs, if within the United States, it passes to and vests in the trustee. * * * Under the scheme of the bankrupt act, the District Court of the domicile of the bankrupt taxes exclusive jurisdiction of the bankrupt and his property, wherever situate. * * * There are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction."

In Re Granite City Bank, 137 Fed. 818 et seq. (Philips, J.)

The legal effect of this (the filing of a petition in bankruptcy) was a caveat—a warning in rem to all the world that the estate of said insolvent had passed under the jurisdiction of the bankrupt court, and *eo instante* it operated as an attachment of the property of the bankrupt or as an injunction against all other creditors and persons to not thereafter interfere with the estate. In contemplation of law, the estate was thenceforth in custodia legis. * * * Its effect (the filing of the petition) was to notify all the creditors of the insolvent estate that so far as they were concerned the property—the estate of the bankrupt—was subject to the jurisdiction of this court. No creditor of the estate could thereafter meddle with the property or assert any right to or lien thereon except through and by a proceeding in this court." (Philips, J.) Openhym v. Blake—Fed.—. In Markson v. Heaney, Fed. Cas. 9098. 1 Dillon, 497, it is held (Dillon, J.) a court of bankruptcy in which a petition in bankruptcy was pending (in that case a court in Kansas) might enjoin a citizen of Minnesota from maintaining in Indiana an action against the bankrupt instituted after the petition in
64 bankruptcy was filed. "Congress in passing the (bankrupt) act, in pursuance of its constitutional power, not only intended to make it uniform, but operative throughout the United States. It does not stop at state lines. * * * It would be destructive of the system itself to permit suitors by resorting to state tribunals, to withdraw against the will of the bankruptcy court, property or cases which belong to its jurisdiction. * * * Creditors wherever residing within the United States are within the operation of the act. * * * It is plain, beyond controversy, that the property of the bankrupt though situate in this case in another state * * * is within the jurisdiction and under the control of the bankrupt court in Kansas." Judge Dillon then quoted from Ex parte Christy, 3 How. (U. S.) 221 (Story, J.) to the effect "the jurisdiction was confided to a single court * * * in preventing by injunction, or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the state tribunals."

The same doctrine is announced in Re Richardson, 2 Benedict (U. S.) 517; Fed. Cas. No. 11774. (Blatchford, J.)

"The bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed."

In Re Weinger, Bergman & Co., 126 Fed. 875, 876.

To the same effect, 138 Fed. 627.

"The (bankruptcy) court may * * * restrain, not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith."

65 In Re Jersey Island Packing Co., 138 Fed. 625, 629.

In Re Union Trust Co., 122 Fed. 937, it is held, the word "estate" as used in section 2, of the bankruptcy law, authorizing courts of bankruptcy to "cause the estates of bankrupts to be collected," covers all property in the possession of the debtor when the proceedings are instituted.

"Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. * * * an erroneous decision does not make void the judgment of the court."

Wagner v. United States, 104 Fed. 133, 135.

"The stay of suits against the bankrupt pending the bankrupt proceedings is absolutely necessary to give effect to the bankruptcy act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2, clause 15, necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, as the greater power includes the less. The debt being contracted prior to the adjudication, the creditor is a party to the (bankruptcy) proceeding.'

In re Basch, 97 Fed. 761, 762.

"Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. * * *

Such right to possession is obtained as will tend to retain intact
the actual and visible assets of the bankrupt to the end that
66 when the adjudication is made, the trustee may be vested not
only with the bankrupt's title to the property but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked. * * * Manifestly, the jurisdiction of this court having attached before that of any other court," it was held proper to enjoin subsequent proceedings in a state court.

In re Kleinhans, 113 Fed. 107, 109.

"Where a creditor claiming a mechanic's lien on property of a person who has been adjudged bankrupt, over which the court has acquired jurisdiction, brings an action in a state court for the fore-

closure of such lien without leave of the bankruptcy court, it is an unwarrantable interference with the assets of the bankrupt in the custody of the latter court, and the further prosecution of such action will be stayed."

In re Emslie, 102 Fed. 291, 292.

"These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with, the property of the bankrupt. They are but creditors of the bankrupt who have, in their effort to collect their money, sought an advantage which the law does not give, and they cannot gain any favored position by reason of an act of theirs which the law condemns."

Bear v. Chase, 99 Fed. 920, 924.

The general scheme of the bankruptcy law is that all creditors of the same class shall share equally in the assets of the estate. This is emphasized by section 29 *b* of the bankruptcy law which
67 makes it an offense punishable by imprisonment for a person to receive any material amount of property from a bankrupt after the filing of the petition with intent to defeat the act. By section 2, clause 4, a bankrupt is defined to include a person against whom a petition in involuntary bankruptcy has been filed. By section 2, clause 19, it is provided the word "persons" shall include corporations.

Let us assume that plaintiff in the case at bar had received of defendant, after the filing of the petition in bankruptcy, a check for the amount claimed to be due plaintiff, and this check had been issued on the garnishee in this case, Union Avenue Bank of Commerce. Would not such action on the part of plaintiff have been a crime within the meaning of the law, as hereinbefore cited? It has been so held, in effect.

In re Brooks, 91 Fed. 508, 509.

Will a court aid a plaintiff in the commission of a crime, and thus become an accessary after the fact?

Again, it will be recalled that while Missouri is a free and independent state, it is such subject "to the Constitution of the United States." Const. of Missouri, Art. II., sec. 3.

By section 8, of Article I. of the Constitution of the United States, Congress has power to establish "uniform laws on the subject of bankruptcies throughout the United States."

"The rights and liabilities of parties are controlled by the bankrupt act and when the State law comes in conflict with it, it must yield."

Rosenfield v. Siegfried, 91 Mo. App. 169, 184.

68 "The bankruptcy law is paramount."

In re Watts, 190 U. S. 1, 10.

The bankruptcy law, being then the law of the land, will be recognized and enforced by a state court. Independent of an injunction

being issued in Illinois, the trial court should have recognized the pendency of the bankruptcy and not proceeded to a judgment while the bankruptcy was pending. Of what avail is a national bankruptcy law and what becomes of the equitable rule of distribution therein announced, if pending a petition, creditors of the bankrupt may seize, levy upon and attach the estate and subject it to the payment of their debts?

II.

It will be noticed the case at bar is an action upon an open account. (Rec., pp. 1, 2). An exhibit is attached to the petition which is wholly meaningless. This exhibit speaks of "Y. P." without any statement whatever advising the defendant of the nature of the items specified.

McCrary v. Good, 74 Mo. App. 425, and cases cited in appellant's brief in that case.

Moffett-West Drug Co. v. Johnson, 80 Mo. App. 428.

It is provided by statute (Rev. Stat. Mo. 1899, sec. 630) that if, in an action upon an account, the items of the account be not set forth in or attached to the petition, plaintiff "shall be precluded from giving evidence thereof."

In the course of the trial made the objection that the account attached to the petition was so indefinite and uncertain, as not to comply with the statute. The objection was overruled and in so doing, the trial court committed error. (Rec. pp. 9, 11.)

69

It must be recalled the action is not upon an account stated, but on an open account.

"When a pleading does not comply with the statutory requirements, the adverse party may * * * at the trial object to the introduction of any evidence to sustain it."

Dawson v. Quillen, 61 Mo. App. 672, 676;

Labadie v. Maguire, 6, Mo. App. 573.

III.

It is provided by statute (R. S. 1899, sec. 726): "When a verdict shall be found for a plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery."

The assessment of the amount of the recovery cannot be done by the court.

Cates v. Nickell, 42 Mo. 169;

Burghart v. Brown, 60 Mo. 24.

"The verdict upon which the judgment is entered must not only be the verdict returned by the jury, but its amount must be the result of their calculation."

Dyer v. Combs, 65 Mo. App. 148, 152.

"It was the province of the jury to calculate the amount due and the court should not have directed what amount the verdict should be (citing authorities)."

Corbitt v. Mooney, 84 Mo. App. 645, 647.

70 "The clerk in entering the judgment had no authority to calculate the interest. The jury should have done that."

Calkins v. Bank, 99 Mo. App. 509, 513.

"It is the province of the jury to make the computation and it is error for the court to do it for them."

Dawson v. Wombler, 111 Mo. App. 532, 539.

In the petition in this case at bar, judgment is asked for $1453.58, together with interest "from demand of payment" (Rec., p. 2). The petition was filed December 7, 1903, (Rec., p. 1) and the trial was June 20, 1905 (Rec., p. 6). A witness testified that the interest from the date of the filing of the petition to the time of trial was $133.94, making a total due the plaintiff of $1587.52 (Rec., p. 16). Then the trial court gave a peremptory instruction to the jury to find in favor of the plaintiff for this amount. (Rec., p. 49.) In so doing, in the light of the authorities, supra, the trial court committed error.

IV.

The peremptory instruction to find for the plaintiff was wrong for another reason. The right of the plaintiff to recover depended on oral testimony. (Rec., pp. 8-16.)

"Where a plaintiff introduces oral evidence to support his case, the issues of fact should be submitted to the jury. Even though the evidence is all one way, it is the province of the jury to weigh and consider it all and to answer whether or not it believes the evidence to be true.

Dawson v. Wombles, 111 Mo. App. 532, 540, and cas. cit.

71 "All questions of fact, in suits at law, must finally and conclusively be determined by the jury."

Gannon v. Laclede Gas Light Co., 145 Mo. 502, 519.

The credibility of testimony "although undisputed by direct testimony, was for the prior of the facts."

Hunter v. Wetherington, 103 S. W. (Mo. Sup.) 543, 545.

V.

The peremptory instruction of the trial court directing the jury to allow plaintiff interest is wrong for another reason: The petition does not plead a demand. (Rec., pp. 1, 2.) Judgment is prayed for the amount due "together with six per cent interest thereon per annum from demand or payment, to-wit, from the — day of ——, 1903," (Rec., p. 2.)

Interest cannot be recovered from the institution of a suit, when it is not demanded in the petition.

Van Riper v. Morton, 61 Mo., App. 440;
Shockley v. Fisher, 21 Mo. App. 551;
Brown v. Brown, 124 Mo. 79;
Morley v. City of St. Joseph, 112 Mo. App. 671.

The judgment rendered below should be reversed by this court and the cause remanded with directions to stay proceedings therein until a dismissal of the petition in bankruptcy or an adjudication thereon.

KARNES, NEW & KRAUTHOFF AND
NEWMAN, NORTHRUP, LEVINSON
& BECKER, *For Appellant.*

72 Afterwards, to-wit, on the 9th day of January, 1908, there was filed statement and brief from respondent, which said statement and brief is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1907, January Call, 1908.

Number 13180.
BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Statement.

This is an action on account for eight cars of yellow pine and poplar lumber sold by respondent, a Missouri corporation, to appellant, an Illinois corporation, engaged in the manufacture of harvester machines. The lumber was sold in part on orders obtained by the secretary of the Beekman Lumber Company, at the office of the Acme Harvester Company, at Peoria, Ill., and in part by
73 original mail orders, but in all cases written confirmations of the order were mailed by the Acme Harvester Company to the respondent, and as fast as the orders were filled, invoices were sent, and when the cars were received and unloaded, they were tallied by the Acme Harvester Company, and the invoices passed to the treasurer for payment, and if there was any difference between their inspection and tally, and the invoices, they would advise the Beekman Lumber Company for correction of the account. Finally in order to know the exact state of the account from the books of the Acme Harvester Company, the Beekman Lumber Company asked and received a summary of the account which is found on pages 12 and 13 of the record, as stated in their letter of November 19, 1903, as follows:

"Beekman Lumber Company, Kansas City, Mo.

"GENTLEMEN: As per your request of the 17th, we take pleasure in enclosing herewith detailed statement showing amounts which

have passed to your credit on account of cars shipped us. We trust that this statement will meet with your approval and beg to remain, etc."

This account was offered in evidence as "Exhibit B" and began as follows:

"Detailed Statement of Lumber Shipped by Beekman Lumber Company and now unsettled for," giving the date of each invoice, the amount charged by their reports, the freight deducted and the amount credited to the Beekman Lumber Company, stating a balance due of $1,453.58.

74 This statement of the account by the Acme Harvester Company was adopted as the account of the Beekman Lumber Company and the exhibit attached to the respondent's petition, shown on page 2, is in exact accord with this account, being, if anything, more particularly stated. There was no attempt made at the trial to dispute this account other than the objection that it was not specific enough, and the account or liability was further admitted by the evidence offered by the defendant on the trial, "Exhibit E" shown on page 22 of the record. This was the petition of the Acme Harvester Company for an injunction against the Beekman Lumber Company, filed in the United States District Court for the Northern District of Illinois, and signed by the manager of the company and part of the attorneys who appear of record herein. In that petition appears the solemn recital as follows:

"Your petitioner, the Acme Harvester Company, respectfully represents that the Beekman Lumber Company, a creditor of this company to the amount of about $1,600, etc."

There being no dispute of the account and the admission of the liability being in writing, Judge Teasdale properly gave the peremptory instruction to find for plaintiff, shown on page 49 of the record. This was followed by judgment, (Record, page 6), against the defendant for the sum of $1,587.52 and a further judgment that the defendant not having denied the ground of attachment the same stood confessed and judgment against the garnishee

75 for the sum of $1,342.45, admitted to be money of the defendant in its hands.

II.

It seems that the affairs of the Acme Harvester Company had become somewhat tangled and as a result thereof a creditor's committee had been organized at Chicago, and as indicated by the circular letter sent out by them (see page 46 of the record), at a meeting of some of the larger creditors on October 17, 1903, it was decided to have a creditors' committee take charge of the company's affairs, and this committee sent out copies of an agreement shown on pages 44 and 45 of the record, to be signed by the creditors. This agreement, in effect, provided for the resignation of the officers of the Acme Harvester Company when requested by the creditors' committee, who should have the power to elect directors and the creditors' committee, through the board of directors so elected, should have the power to operate the business, make payments and

adjustments and settle up the business, and after signing such agreement no creditor should have the right to prosecute any claim as long as the agreement remained in force. This agreement the respondent refused to sign and at no time did it appear or take any part in the matters herein referred to occurring in the State of Illinois.

From the evidence it appears that a petition in involuntary bankruptcy was filed at Chicago on the 23rd day of November, 1903. This petition appears to have been an abortive effort to take
76 the management out of the hands of the creditors' committee, for under date of October 24, 1903, this committee advised the creditors in part as follows (See Record, page 48):

"A petition in bankruptcy was filed today by a law firm of this city claiming to represent three claims, for the purpose of throwing the company into bankruptcy. One of the three creditors, as soon as he learned the purpose of the attorneys, repudiated their action and withdrew from the bankruptcy proceedings. * * * We feel confident that the court will deny the application for a receiver and leave the business in the hands of the creditors."

Again under date of October 26th, the committee say (See record, page 28):

"In our letter of October 24th we advise that a certain law firm of this city had caused a petition in bankruptcy to be filed against the Acme Harvester Company, and made an application for the immediate appointment of a receiver. We are pleased to report that the motion for a receiver was heard this morning by the Hon. C. C. Kohlsaat, federal judge in Chicago, who refused to appoint a receiver and said: 'This estate is a very large one and is in the hands of a committee of reputable creditors. It is my judgment that the creditors ought to manage and control the estate. The creditors can produce results much better than any receiver in handling a large manufacturing concern like the Acme Harvester Company.' * * * At the close of the argument the court referred the matter to Judge David McCulloch, Referee in Bankruptcy, at Peoria, to inquire into the truth of the allegations of the petition, and to ascertain whether the petitioning creditors have any
77 standing or right to file a petition in bankruptcy. There is really only one creditor left in the bankruptcy proceeding, although persistent efforts have been made by the lawyers to get other creditors to join."

Under date of November 2, 1903, (Record, page 27), signed by part of the attorneys of record herein, appears the following:

"The creditors' committee is proposing to take such steps as will inure to the benefit of all creditors."

Under date of December 2, 1903, the Acme Harvester Company writes to the Beekman Lumber Company (Record, page 25):

"The writer sees from our records that you have not as yet signed the credit committee agreement whereby the affairs of this company are to be placed in the hands of five gentlemen for the purpose of working up our assets and gradually liquidating our indebtedness. You may not be aware that United States Judge Kohlsaat has stop-

ped the matter of any one bringing suit against this company or endeavoring to throw it into bankruptcy, he having decided that we are solvent and that the only reasonable and fair way to handle the business, paying its debts, etc., is through the medium of the credit committee selected by our heaviest creditors. This being the case the only basis on which your claim will receive recognition is by joining with the balance of our creditors, signing the agreement, thus putting yourself on record that you are a creditor and are entitled to such dividends as from time to time the committee might declare.

* * * It will not be a great while before, under the man-
78 agement of the committee, we will again be in the market for raw materials and at that time, as heretofore, we will take pleasure in having you figure on supplying at least a portion of our requirements."

It appears (Record, page 39) that one, Samuel D. Porter, took charge of the affairs of the company as manager for the creditors' committee, and by his report (See record, page 37), it appears that he disbursed, up to January 14, 1905, the sum of $927,217.84.

To repeat in chronological order the events herein, the petition in bankruptcy was filed in Chicago, October 22, 1903.

An adjudication was refused on October 26, 1903.

The petition on account herein was filed December 7, 1903.

The motion to stay proceedings herein was filed December 24, 1903.

This motion was sustained January 11, 1904.

Our motion to set aside the stay of proceedings was filed March 30, 1904.

This motion was sustained May 14, 1904.

The second garnishment was issued herein on June 2, 1904.

A petition for an injunction was filed at Chicago, October 3, 1904 (See record, page 22), and at the same time, without the appearance of the Beekman Lumber Company in said proceedings, the injunction order was issued attempting to restrain it from further prosecution of this suit (See record, page 24).

The trial of this cause in the Circuit Court was had on June 20, 1905.

79 *Brief.*

I.

The only question of any importance in this case is as stated in the appellant's brief, that is, the effect of the proceedings in bankruptcy filed in the court of the United States as against an action thereafter instituted in a state court.

For the purpose of this argument let us assume that a sufficient number of creditors had signed the petition and that the United States Court had assumed jurisdiction in the regular way for the purpose of adjudication in bankruptcy, of the appointment of a trustee or a receiver and the only question was one of staying the proceedings in the State Court until in the usual course the United States Court could act and adjudicate the alleged bankrupt or dis-

miss the proceedings, what then would be the effect of the pendency of the bankruptcy proceedings?

This question may be answered by the case decided in the District Court of the United States for the Western District of Missouri by Judge McPherson in re Wells, 114 Fed. Rep., p. 222, decided February 24, 1902, from which case we quote the syllabus, as follows:

"1. *Bankruptcy—Jurisdiction of Court of Bankruptcy—Property Claimed by Third Persons.*

The filing of a petition in involuntary bankruptcy does not of itself vest the court of bankruptcy with jurisdiction over all
80 property then in the possession of the bankrupt, whether owned by him or not, to the exclusion of the jurisdiction of a state court to try the title to such property.

2. *Same—Enjoining Suit in State Court—Priority of Jurisdiction.*

On the day following the filing of a petition in involuntary bankruptcy against a debtor, and before any action had been taken by the court, a corporation commenced an action in replevin in a state court to recover property of which it claimed to be the owner, but which was in the possession of the bankrupt, and such property was taken under the writ of replevin. Subsequently the court of bankruptcy appointed a receiver, made an adjudication, and appointed a trustee. Held, that it did not acquire jurisdiction over the property which had been taken on the writ of replevin, and which was never in its possession, and was not authorized to enjoin the further prosecution of the action in the state court, and compel the plaintiff therein to submit its claims to its own jurisdiction."

From the opinion it appears that Wells was adjudicated a bankrupt on the 26th day of November, 1900, on his confession filed November 8, 1900, that he had committed the act of bankruptcy charged. On November 10, 1900, a receiver was appointed by the referee. On the same day (November 8, 1900) that the proceedings in bankruptcy were instituted, the McFarland Carriage Company prepared a petition in replevin against Wells to recover certain personal property in his possession, but which, as alleged, belonged to the carriage company. The petition in replevin was filed in
81 the Circuit Court of Pettis County, on the following day, November 9, 1900. We quote from the opinion:

"To restate the case, after the petition in bankruptcy was filed, but before the receiver was appointed, and before the adjudication of bankruptcy, the state court took possession of the property now in controversy. The trustee, by the direction of the referee, appeared in the state court, and asked leave (which was granted) to defend against the action in replevin. He filed his answer therein a year or more ago. The trustee now files in this court his bill in equity, asking that the carriage company, by writ of injunction, be enjoined from the further prosecution of the replevin action in the

state court, and that the carriage company be commanded to deliver possession of the property taken under the writ of replevin, over to the trustee, and, if the property cannot be delivered, that the carriage company be required to account to the trustee for the value thereof. The question, therefore, is, does the filing in this court of a petition in involuntary bankruptcy, of itself, and before any order is made by this court, give this court jurisdiction of all the property then in the possession of the bankrupt, whether by him owned or not? And if the bankrupt then has possession of the property, but not owned by him, or the question of ownership is disputed, must the claimant have the question of ownership adjudicated by this court, and to the exclusion of the state court, which has taken possession of the property for adjudication.

"All agree that the court, state or federal, which first takes possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the
82 'possession' does not mean physical possession. This court, by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Counsel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a state court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and sometimes by lawyers, by asserting that the United States courts are greater and more commanding than the state courts. I cannot agree to this. The state courts are courts of general jurisdiction, while the Federal Court is one of limited jurisdiction. Of course, when a Federal Court once acquires jurisdiction, then such jurisdiction becomes complete. And it is true that on some questions the Federal Courts have exclusive jurisdiction—such as in admiralty and other cases. Under some of the old bankruptcy statutes such has been the case. But it is not so under the act of 1898. But little is gained by reviewing the decisions of the different State Supreme Courts or of the Federal Trial Courts. Such decisions are not binding on this court, and are in conflict, and cannot be reconciled. And no great headway is made by reviewing the dicta of the writers of opinions of the cases in the Supreme Court. But light has been given us by six cases decided by the Supreme Court: Bardes v. Bank, 178 U. S., 524, 20 Sup. Ct. 1,000, 44 L. Ed., 1175. That case was a thoroughly
83 considered one. The object sought in that case was, in one respect, just the same as in the case at bar, viz., the trustee wanted to reduce to physical possession property which was not in his hands, but to which, as he alleged, he was entitled. And the Supreme Court held that the trustee must litigate the matter in a state

court; which state court would have exclusive jurisdiction unless the adversary to the trustee would consent to come into the Federal Court. The language of the opinion in that case has been criticised, but the holding of the court in that case stands. Mitchell v. McClure, 178 U. S., 539, 20 Sup. Ct. 1,000, 44 L. Ed., 1,182; Hicks v. Knost, 178 U. S., 541, 20 Sup. Co., 1,006, 44 L Ed., 1,183. These two cases follow the Bardes decision. * * * Bryan v. Bernheimer, 181 U. S., 188, 21 Sup. Ct., 557, 45 L. Ed., 814, shows this state of facts: The debtor made an assignment for the benefit of creditors. Then proceedings in bankruptcy were brought. After the filing of the petition in bankruptcy, the assignee in the state insolvent law proceedings sold some of the debtor's property. Subsequently, the adjudication in bankruptcy. Still later, proceedings were instituted in the Federal Court to recover the property thus sold. And the purchaser appeared in the Federal Court, and asserted his claim to the property, and it was held that the property belonged to the estate in bankruptcy. It will be observed that the purchaser surrendered himself, without protest, to the jurisdiction of the Federal Court. That this is what gave the Federal Court jurisdiction is apparent from the case, and is specifically stated in a paragraph on page 197, 181 U. S., and page 560, 21 Sup. Ct., 25 L. Ed., 814. Of course, the Federal Court in such a case has jurisdiction, and would have in the case at bar if the carriage company would consent. But it protests. * * *

84 "But as an independent question, without these holdings of the Supreme Court, I would regard it my duty to deny the injunction herein. The act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the Federal Courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties reside." Under the former statute, the title to all property passed upon the merely filing of the petition. The judiciary committee of the house, in reporting the bill which became the present statute, called attention to this evil, and said that it was corrected by passing the title as of the date of adjudication. And such is the language of the statute. And if this is not so, see what we have: a petition is filed. The debtor can, and often does, deny the commission of the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudicated a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the creditors kept quiet and avoided such expense and liability. Now in the mean time can it be possible that nothing can be done by the debtor or by the other court?

"The writ of injunction is denied."

II.

The bankruptcy act of 1898 only contemplates summary proceedings for the determination of the issues. Section 18 provides:

85 "If the bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine as soon as may be the issues presented by the pleadings; * * * and make the adjudication or dismiss the petition. Again, if on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall, on the next day, if present, make the adjudication or dismiss the petition.

III.

The language of Section 11 of the bankrupt act, providing for a stay of proceedings, by express terms excludes from its operation those suits which may be filed after a petition in bankruptcy has been filed.

"SEC. 11. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition."

IV.

Again, assuming that the proceedings in the Federal Court were regular and the proceedings were being had within the terms of the described act, did the court have a right to issue an injunction against the respondent who was not within the territorial limits of the bankrupt court? It will be remembered that the United States courts are prohibited from issuing injunctions against the state courts in all cases except where specially provided for by the bankrupt act.

86 By Sec. 2, Chap. 2 of the Bankrupt Act, the bankrupt courts "are hereby invested within their respective territorial limits as now established, with such jurisdiction, etc." Such an express limitation of jurisdiction to the territorial limit of the court was similar to that of the act of 1867 with reference to which Mr. Justice Bradley, in Lathrop v. Drake, 91 U. S., 517, said:

"When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts."

Hence a District Court, sitting as a court of bankruptcy, has no greater power or authority outside of its own district than it had before the bankruptcy statute was enacted. Thus it has been held (with one exception, not material here) that a writ of subpœna or other process cannot be served beyond the limits of the district of the court issuing the writ.

Loveland on Bankruptcy (Ed. 1899), page 66, and cases cited in note.

By express provision, the jurisdiction is granted, subdivision 5 of Section 2, Chapter II, to authorize the business of bankrupts to be conducted for limited periods by receivers or marshals or trustees if necessary in the best interest of the estates. By subdivision 1 of Section 3, Chapter III, it is provided that if solvency, at said date, (the filing of the petition), is proved by the alleged bankrupt, the proceedings shall be dismissed. Staying a suit in a state
87 court is not a dismissal. It does not defeat the cause of action providing no discharge is granted. It merely suspends proceedings in the state court so long as the injunction is in force. Future action in the state court depends upon the action of the court of bankruptcy. If a discharge is refused, the injunction is dissolved.

Loveland on Bankruptcy, pages 77 and 78, citing cases in note.

V.

If the discharge is refused, that operates as a dissolution of the injunction. How much more then, is an injunction dissolved by a prior declaration or finding of the United States Court that the alleged bankrupt is solvent? Here were no proceedings within the terms of the bankrupt act. Surely it was not intended by the act to furnish a cloak to shield a debtor from his creditors, to permit the conduct of the business not by a receiver, marshal or trustee, but by a portion of the creditors, and the appropriation of the business by them to their own purposes. No trustee was appointed, no adjudication was had, and as the title only passes as of the date of the adjudication, the defendant's title to the fund in controversy herein has never passed. If the bankruptcy court, and not the defendant, or committee of creditors, usurping the defendant's place and property, had desired a stay of proceedings herein, we have no doubt that upon the appointment of a trustee, and a suggestion from the trustee that an adjudication had been had in this case, this case would have been stayed until final discharge of the bankrupt or dismissal of the petition. But the respondent herein waited before
88 filing its suit until the United States Court in bankruptcy had found the alleged bankrupt to be solvent and refused the adjudication.

It is suggested by counsel, on page 2 of their brief, that the injunction is still in force, and this statement is made dehors the record. We therefore give them notice we shall tender, with the filing of these briefs, certain documents showing what disposition has been made of the proceedings in bankruptcy in order that the court, if it desires, may know the facts outside, and since the record was made below.

VI.

But it is urged that the court committed error in giving a peremptory instruction to the jury to find for the plaintiff notwithstanding the fact that we adopted the appellant's statement of the account, and that the suit is brought on that, and that the appellant was not

in a position to dispute the account and did not in fact offer any evidence contradicting it. How this can affect the substantial rights of the appellant so as to authorize this court to reverse the case on that ground is not made to appear. The rule as to peremptory instructions is subject to certain exceptions as well established as the rule itself. They are, first, where the judgment is manifestly for the right party.

Ford v. Dyer, 148 Mo., 541;
Wolff v. Campbell, 110 Mo., 120.

Second. Where the facts are practically undisputed.
Hawes v. Mulholland, 78 M. A., 500;
Brewery Co. v. Lindsey, 72 M. A., 591.

89 Third. Where there is no evidence tending to prove any defense to plaintiff's demand.
Hoster v. Lange, 80 M. A., 238;
Mosby v. Com. Co., 91 M. A., 504;
Bank v. Hainlaine, 67 M. A., 483;
Powell v. Price, 111 M. A., 320.

In Brewery Co. v. Lindsey, (*supra*), it is said (p. 594):

"The general rule is that such an instruction ought not to be given unless the other party admits all constitutive facts, or such facts have been established by documentary evidence which he is estopped to deny."

In Bank v. Hainlaine, (*supra*), at page 487, the court say:

"When a case is made out for a plaintiff on a legal cause of action, by legal evidence, which, in the opinion of the trial court is undisputed by fact, or circumstance, and which is reasonable in its import, according to the human understanding, as applied to the ordinary affairs of life, he is entitled to have the verdict of a jury. The jury cannot be allowed to arbitrarily confiscate the property of a citizen. If A sues B on an account for labor and at the trial shows by evidence which is undisputed, even by circumstances of suspicion, in manner of giving testimony or otherwise, and which B makes no pretense of contradicting or denying (except by his pleading), can a jury in such case confiscate the account by returning a verdict against it? Certainly the trial court would not permit such a verdict to stand. If it would not be permitted to stand, then why the idle form of submitting the case?"

90 In Bolt & Nut Manufacturing Company v. Railroad, 120 M. A., at page 632, the Court of Appeals say:

"This judgment was manifestly for the right party and it looks like the court might have directed a verdict in plaintiff's favor. The correspondence, in connection with Molitor's testimony, established beyond doubt that the material was consigned to plaintiff in care of the Midland Valley Railroad Company and arrived at its destination under the consignment."

In Ford v. Dyer, 148 Mo., at p. 542, this court said:

"The construction of the contract being for the court, after de-

fendant admitted that he had received and still retained all the machines for which compensation was claimed in the first count of the petition the purchase price for which was fixed by the contract and no evidence had been introduced by him showing a cancellation of the contract, our conclusion is that no error was committed in giving the peremptory instruction to find for plaintiff."

In Wolff v. Campbell, 110 Mo., at p. 120, this court declared:

"Where a judgment is manifestly for the right party it ought not to be reversed."

VII.

And the very minor points, that the exhibit attached to plaintiff's position, being a copy of the account furnished by the plaintiff, was too indefinite, or that the jury failed to assess the amount of recovery, or that the petition did not plead a demand—we say that those minor errors, if errors they are, are cured by the
91 statute after verdict and in no wise affect the substantial rights of the appellant. The sufficiency of the exhibit may also be answered by an inspection of it as set out in the record. The burden of establishing the sufficiency of the bankruptcy proceedings was on the appellant and the evidence shows a failure to show an adjudication or any proper proceedings to have justified a further stay.

We submit that the action of the trial court in setting aside the stay order after having given a reasonable time to the appellant to have shown a proper case for further stay of proceedings, and in proceeding to final judgment in the manner shown, was right and should be affirmed.

We further submit that this appeal is wholly without merit and that the affirmance should be attended with the penalty of 10 per cent damages.

Respectfully submitted,

STEWART TAYLOR,
Attorney for Respondent.

92 Afterwards, to-wit, on the 13th day of January, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LUMBER CO., Resp.,

v.

ACME HARVESTER CO., App.

Come now the said parties by attorneys, and after arguments herein submit this cause to the court.

Afterwards, to-wit, on the 31st day of January, 1908, there was filed reply brief for appellant, which reply brief is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, A. D. 1907.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Reply Brief for Appellant.

I.

The Court will recall that at the oral argument of this case some attention was paid to the question of jurisdiction. The jurisdiction of this court arises from the language used in Section 12, of Article VI of the Constitution: "In cases involving the construction of the Constitution of the United States; in the cases where the validity of a treaty or statute of, or authority exercised under the United States is drawn in question."

So far as the Constitution of the United States is concerned, no protection under that instrument was specifically claimed in
93 the trial court, and so we assume that no constitutional question arises on this appeal.

See cases cited in West Publishing Company, Annotated Statutes of 1906, at page 224.

As to the validity of a statute of or authority exercised under the United States, the following cases are in point:

In Vaughn v. Wabash Railroad Co., 145 Mo., 57, it was held that a case involving the question of a compliance with a federal statute did not come within the appellate jurisdiction of the Supreme Court.

In Robert C. White Live Stock Commission Co. v. Chicago, etc. Ry. Co., 157 Mo., 518, it was held the Supreme Court had no jurisdiction of a case involving merely the construction of a federal statute, the validity of the statute itself not being drawn in question.

In Lail v. Express Co., 81 Mo. App., 232, it was held the jurisdiction of the court of appeals was only denied where the validity of the act was drawn in question, and not where the construction of an act of Congress was involved.

In Shewalter v. Missouri Pacific Ry. Co., 152 Mo., 544, it was held this court had no jurisdiction of a case arising under the interstate commerce law, and the case was transferred to a court of appeals

In M. K. & T. Ry. Co. v. Smith, 154 Mo., 300, it was held that a suit on an injunction bond given in a federal court did not present a federal question so as to bring the case within the jurisdiction of the Supreme Court.

94 In State ex rel. v. Bland, 168 Mo., 1, the Supreme Court refused to compel the judges of the St. Louis Court of Appeals to

certify to the Supreme Court a case against a railroad company, claimed to arise under an act of Congress.

In Carlisle v. Missouri Pacific Ry. Co., 168 Mo., 652, a case arising under an interstate commerce law was held to present no federal question, and was transferred to a court of appeals.

In connection with the foregoing it should be noted the Kansas City Court of Appeals in Reed v. Western Union Telegraph Co., 56 Mo. App., 168, certified a case to this court on the ground that it presented a federal question.

When the case reached the Supreme Court jurisdiction thereof was retained and the case decided on its merits without any discussion of the question of jurisdiction.

Reed v. Western Union Tel. Co., 135 Mo., 661.

In First National Bank v. American National Bank, 173 Mo., 163, the liability of a national bank upon a contract of acceptance was held to present a question arising under the laws of the United States, and the Supreme Court retained jurisdiction of the case.

In Central National Bank v. Haseltine, 73 Mo. App., 60, a court of appeals transferred a case to the Supreme Court on the ground that it involved the right of a national bank to collect interest.
95 The Supreme Court retained jurisdiction of the case and disposed of it on its merits. 155 Mo., 58.

The section of the Constitution of Missouri hereinbefore quoted is practically the same as section 709 of the Revised Statutes of the United States found in 4 Federal Statutes Annotated, at pages 467 et seq. By consulting the cases on page 470 of that publication the court will find collected the decisions of the Supreme Court of the United States construing the statute in question.

These cases are cited not because the defendant in the case at Bar is desirous this court shall not take jurisdiction of the appeal; the cases are cited in order that the court will have all of the light possible upon the question of jurisdiction, which, after all, lies at the threshhold of every case in this court, and because the question of jurisdiction is one which the parties may not waive and which the court may determine for itself.

II.

In the brief of the plaintiff filed in this court it is said: "An adjudication was refused on October 26, 1905." (Brief, p. 7.)

An inspection of the record will show there has been no formal refusal of the adjudication. The most that can be said of the letters read in evidence is that the court refused to appoint a receiver. Refusing to appoint a receiver in a pending proceeding is a far cry from refusing to grant the petitioning creditors an adjudication upon a final hearing. A court may, upon a preliminary application,
96 refuse an injunction or refuse to appoint a receiver, but the suit is still pending and can only be disposed of by a final dismissal on the merits.

Again, it is stated the injunction issued in Illinois was dissolved

"by a prior declaration or finding of the United States court that the alleged bankrupt is solvent." Respondent's brief, p. 16.

A record of this case shows that the injunction was granted long after the court refused to appoint a receiver. The court denied an application for a receiver because the property of the bankrupt was in the hands of a competent committee of creditors which was working out the situation. The court thereafter issued the injunction. Hence if there be anything inconsistent between the appointment of a receiver and the issuance of an injunction it must follow that as the injunction was issued after the application for the receiver was denied, the effect of the later action of the court is to nullify the former.

III.

On the question of the right of a trial judge to compute the interest and to include the amount of the interest in a peremptory instruction to the jury to find for the plaintiff; we call the attention of this court to the language of the Kansas City Court of Appeals in a recent case;

"The judgment recovered by plaintiff would not be disturbed but for the presence in the record of error we are about to discuss. Referring to the amount of plaintiff's recovery, the court in-
97 structed the jury as follows: 'If the jury finds for the plaintiff in this cause, they will assess the damages at $1,000 together with interest thereon at the rate of 6 percent per annum from the 16th day of May, 1901, to this date.' Form of verdict; 'If all of you agree upon a verdict for plaintiff, it may be in the following form: We, the jury find the issues for the plaintiff, and do assess her damages at $1,240. ——, Foreman.' It will be noticed, in the first of these instructions, the court directed the jury to compute the interest, while in the second, the interest is computed and included in the amount stated; so that taken together, the instructions amount to a peremptory direction to find a given sum in the event the issues of the case were found in favor of plaintiff. It is contended by defendant that this, being an invasion of the province of the jury, constitutes reversible error. Section 726, Rev. St. 1899 (Ann. St., 1906, p. 716) provides: 'When the verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery.' Plainly this expresses a legislative intent to clothe the triers of fact with the exclusive right to determine the amount of the verdict in actions for the recovery of money only, and the courts of this state may be said to have gone to the extreme in enforcing a rigid recognition of that right. Cates, Admr. v. Nickell, 42 Mo., 169; Poulson v. Collier, 18 Mo. App., 583, Corbitt v. Mooney, 84 Mo. App., 645; Dawson v. Wombles, 111 Mo. App., 532, 86 S. W. 271; Burghardt v. Brown, 60 Mo., 24; Ryors v. Pryor, 31 Mo. App., 555; Dyer v. Combs, 65 Mo. App., 146. In Corbitt v. Mooney, supra, the action was on a promissory note for $300 and interest. Defendant was a surety, and the only defense made by him was that he had signed the note 'without any consideration long after it had been executed and delivered to the

payee.' We held it error for the court to instruct the jury to find for plaintiff in the sum of $522.50, 'unless defendant was found to be a surety signing without consideration,' on the ground that it was the province of the jury to calculate the amount due, and the court should not have directed in what amount the verdict
98 should be, and we observed that the proper practice to be followed in such cases 'is to direct a finding for the amount of the note and interest, without stating in advance what that amount is.' In Cates v. Nickell, the action likewise was on a promissory note, and the only defense offered was the denial of the execution of the note. The jury returned a general verdict in favor of the plaintiff, thereby finding that defendant had executed the note, and the court thereupon entered judgment for the face of the note with accrued interest. The Supreme Court held this to be an invasion of the prerogative of the jury, and in the opinion declared that the note 'upon which the suit was brought is not to be taken as conclusive evidence of the amount due, and the court could not assume that fact from the general verdict rendered.' In neither of these cases is there any suggestion that the court incorrectly computed the amount due as shown by the face of the contract, and in the Cates case the plaintiff argued, as does the plaintiff in the present case, that the error should be treated as a mere irregularity, and not as one prejudicial to any right of the defendant. But that contention was rejected, we think, for a very good reason. The vice of the assumption by the trial judge of the right to direct a verdict for a stated amount, in cases of this character, is that such action is a clear encroachment on ground belonging exclusively to the jury. It is the exercise of a function beyond those pertaining to the office of judge, and to say that as long as the judge does that which the jury should have done, had it been permitted to exercise its functions, the excessive act should be treated as a harmless irregularity, would not only be to ignore the plain intent and purport of the statute, but would be giving countenance to the idea that a judge may, within certain limits, assert the right to discharge functions with which he is not clothed by virtue of his office. A person is as much entitled to have his case tried without any interference with the jury in the performance of its duty as he is to have a trial by jury, and error involved in a deprivation of this right clearly is prejudicial, no matter how righteous the judgment entered may appear to be
99 from the face of the record. The obligation of defendant expressed in the certificate was to pay plaintiff the proceeds of 'one full assessment on all the members of said society not to exceed $1,000.' We do not find any evidence in the record tending to show what would have been the amount of the proceeds of an assessment but, in the absence of proof, the presumption is to be indulged that an assessment would have paid in full the amount named in the certificate. Benefit Association v. Swenson, 49 Kas., 449, 30 Pac., 405. With the aid of this presumption, the obligation expressed on the face of the policy was to pay the full sum of $1,000, but the liability of the defendant under the policy was a contested issue, the burden was on plaintiff to establish the existence of that liability, and, as that burden was in no manner relieved by any admission of defend-

ant, either in the pleadings or the evidence, the court, as was said in the Cates case, was in no position to assume, as a matter of law, that the amount stated on the face of the policy should be taken as a conclusive evidence of the amount due In such state of case, the amount of the recovery was a question of fact to go to the jury.

"A careful inspection of the record discloses no other error, but, for that noted, the judgment is reversed, and the cause remanded. All concur."

"On Rehearing.

"After the foregoing opinion was announced, our attention was directed to section 7903, Rev. St. 1899 (Ann. St. 1906, p. 3758), which provides that: 'Every policy or certificate hereafter issued by any corporation of this state doing business in conformity with the provisions of this article and promising payment to be made upon a contingency of death, sickness, disability or accident, shall specify the exact sum of money which it promises to pay upon each contingency insured against, and the number of days after satisfactory proof of the happening of such contingency at which such payment shall be made, and upon the occurrence of such contingency, unless the contract shall have been voided for fraud or breach of its conditions, the corporation shall be obligated to the beneficiary for such payment at the time and to the amount
100 specified in the policy or certificate; and the said indebtedness shall be a lien upon all the property, effects and bills receivable of the corporation,' etc. The article mentioned is that relating to 'insurance companies on the assessment plan.' Under our ruling that the policy in controversy is not to be treated as a death benefit certificate issued by a fraternal association, it should be classed as one issued by an assessment company, and thus brought within the operation of the statute quoted. A proper construction of the statute requires us to hold that in actions on policies issued by assessment companies, the assessment of the amount due on the policy, exclusive of the accrued interest, is not an act for the jury to perform under the provisions of section 726, Rev. St. 1899 (Ann. St. 1906, p. 716), but is a matter of law and therefore one with which the jury has no concern. Consequently, the court committed no error in stating the amount of the indemnity the policy required defendant to pay in the event of loss (Goodson v. National Accident Ass'n, 91 Mo. App., 339), but we still adhere to the conclusion that it was error for the judge to compute the interest and instruct the jury to include the result of that computation in the verdict.

"Accordingly, the order to reverse and remand the cause is set aside, and the judgment is affirmed on condition that, within ten days from the filing of this opinion, the plaintiff will enter a remittitur for the amount of interest included in the judgment. All concur."

Kroge v. Modern Brotherhood of America, (Mo. App.), 105 S. W. Rep. 687, 689.

All of which is respectfully submitted.

KARNES, NEW & KRAUTHOFF,
NEWMAN, NORTHRUP, LEVINSON &
BECKER, *Attorneys for Appellant.*

101 And afterwards, to-wit, on the 14th day of July, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Appeal from Jackson County Circuit Court.

Now at this day come again the parties aforesaid by their respective attorneys, and the court here now being sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Circuit Court rendered, be in all things affirmed and stand in full force and effect; that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

102 In the Supreme Court of Missouri, Division No. 2, April Term, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

This cause originated in the circuit court of Jackson county, December 2, 1903, in which the plaintiff, a corporation organized under the laws of the State of Missouri, sought to recover of the defendant, a corporation organized under the laws of Illinois, and having its chief office and place of business at Peoria in said State, $1,453.58 for lumber sold and delivered by the plaintiff to the defendant, an itemized account of which was annexed to and filed with the petition. On December 24th, 1903, a motion was filed by the defendant to stay the proceedings on the ground that there was pending against the defendant in the district court of Illinois a petition in involuntary bankruptcy. On January 11th, 1904, motion to stay the proceedings was sustained. On March 30th, 1904, the plaintiff filed its motion to set aside the stay of proceedings, which motion was sustained on May 14th, 1904. On October 12th, 1904, defendant filed an answer in the nature of a plea to the jurisdiction and a plea to the merits in the following words: "Now on this day comes the Acme Harvester Company and appearing especially for the purpose of this plea only pleads to the jurisdiction of this court and says this cause should not be prosecuted. Defendant further avers that heretofore in the district court of the United States for the Northern district of this Southern division a court of competent jurisdiction in that behalf the petition was filed to adjudicate Acme Harvester Company a bankrupt. Thereafter it was by said court

ordered and adjudged that Beekman Lumber Company be enjoined until the further order of that court from maintaining this proceeding or prosecuting this action. The proceedings resulting in such injunction were duly had and the order and judgment of injunction were rendered. The defendant by way of protestation and for answer to the petition of the plaintiff denies generally each and every allegation therein contained." On June 20th, 1905, plain-
103 tiff filed a reply in words as follows: "Plaintiff for reply to the answer *to* the defendant denies each and every allegation of new matter therein made or contained. For further reply plaintiff shows to the court that the matters set forth in defendant's answer were set forth in defendant's motion to stay proceedings herein filed December 24, 1903, which motion was by this court sustained; that afterwards on the — day of ——, 1904, this plaintiff filed its motion to set aside said stay order on the ground named therein that said matters did not entitle defendant to a stay; that said motion was sustained and no appeal was taken therefrom and thereby the matters and things set forth in defendant's answer were adjudged against it and became res adjudicata and the defendant cannot now be heard to urge the same, wherefore plaintiff prays judgment as in his petition." The case was tried at the April term, 1905, and at the close of the evidence the trial court directed the jury to return a verdict in favor of the plaintiff and thereupon in accordance with the directions of the court, the jury did return a verdict in favor of the plaintiff and assess the damages at the sum of $1,587.52, and judgment was rendered accordingly in favor of the plaintiff against the defendant and the court further found that the defendant not having denied the grounds of attachment, the same stood confessed as true and plaintiff's attachment was sustained and the garnishee Union Avenue Bank of Commerce having admitted in its answer the possession of $1,342.45, the money of the defendant, it was further considered and adjudged by the court that plaintiff have and recover of and from said garnishee the said sum so confessed and have execution therefor and that the garnishee be allowed $25.00 as attorney Fees and that defendant be given credit on the judgment for whatever sum the plaintiff may collect from the garnishee. In due time the defendant filed its motion for new trial and in arrest of judgment, which was heard and overruled by the court and defendant excepted, thereupon the appeal was granted to this court in due form on July 15th, 1905, and leave was given the defendant to file a bill of exceptions, which was by the court allowed, signed and sealed and made part of the record. On the trial the
104 plaintiff offered in evidence proof of the delivery of the goods sued for and a letter from the defendant giving a detailed statement of the lumber shipped by plaintiff and the balance due plaintiff from the defendant, showing the sum to be $1,453.58, and rested.

On the part of the defendant the evidence was as follows: A petition in bankruptcy filed against the defendant in the District Court of the United States for the Northern District of Illinois Southern Division on the 23rd of November, 1903, in behalf of certain credi-

tors in which it was charged that the Acme Harvester Company was insolvent and had committed certain acts of bankruptcy, to-wit: in giving illegal preference to certain other creditors. Second, a petition for an injunction against the plaintiff Beekman Lumber Company from prosecuting this present action, which said petition for injunction was filed October 3, 1904. Third. An order granting the injunction until further order of the said district court. In rebuttal the plaintiff offered and read in evidence a letter from the defendant by its vice president H. L. Stone, calling the plaintiff's attention to the fact that it had not as yet signed "the creditors' committee" agreement whereby the affairs of the Acme Harvester Company would be placed in the hands of five of heaviest creditors, for the purpose of working up its assets and gradually liquidating its indebtedness and calling attention to the fact that Judge Kohlsaat had stopped the bringing of the suits against the company or endeavoring to throw it into bankruptcy, he having decided that it was solvent, and that the only reasonable and fair way to handle the business was through a creditors' committee selected by the heaviest creditors, also a letter from Messrs. Newman, Northrup, Levinson and Becker to the plaintiff calling *their* attention to this creditors' agreement and the steps to be taken for the liquidation of the Acme indebtedness. Also a letter from the creditors' committee to the plaintiff as follows:

"Gentlemen: In our letter of October 24th, we advised you a certain law firm of this city had caused a petition in bankruptcy to be filed against the Acme Harvester Company and made an
105 application for an immediate appointment of a receiver. We are pleased to report that the motion for a receiver was heard this morning by the Honorable C. C. Kohlsaat, Federal Judge in Chicago, who refused to appoint a receiver, and said: "This estate is a very large one and is in the hands of a committee of reliable creditors. It is my judgment that the creditors ought to manage and control the estate, the creditors can produce results much better than any receiver in handling a large manufacturing concern like the Acme Harvester Company." At the close of the argument the court referred the matter to Judge David McCulloch, referee in bankruptcy at Peoria to inquire into the truth of the allegations of the petition and to ascertain whether the petitioning creditors have any standing or right to file a petition in bankruptcy. There is really only one creditor left in the bankruptcy proceedings although persistent efforts have been made by the lawyers to get other creditors to join.

Signed by D. L. Forgan, and others, Creditors' Committee."

Plaintiff also offered in evidence another letter from this creditors' committee calling attention to the proposed reorganization of the company and stating that they had received letters from about two thirds of the creditors, eighty per cent of whom desired stock and the rest preferred to accept fifty per cent in cash and asking plaintiff to determine whether they would take stock or cash. Plaintiff also offered in evidence a report of the defendant to the United States District Court of the business of the concern, a statement of its as-

sets and liabilities and the conduct of the business since January 1st, 1905.

1. The first proposition for consideration is whether this court has jurisdiction of this appeal, as the amount of the judgment appealed from is only $1,597.52. We think it is apparent that if this court has jurisdiction at all of this appeal, it must be found in section 12 of article 6 of the Constitution of this State, which gives this court jurisdiction in cases, "where the validity of a treaty, or a statute of, or authority exercised under the United States is
106 drawn in question." The validity of a treaty or a statute of the United States is nowhere challenged in this record so that the question is narrowed down to the proposition whether "authority exercised under the United States" is drawn in question. As to what is *drawing* in question the validity of the authority exercised under the United States has often been the subject of judicial interpretation. The author of this provision of section 12 of article 6 of our Constitution, obviously had in mind the acts regulating appeals to the Supreme Court of the United States from the Supreme Courts of the several States and the District of Columbia, and the Supreme Courts of the Territories. Sect. 709, R. S. U. S. 1878, 23 U. S. Statutes at Large, 443. By these acts an appeal or writ of error is allowed from any judgment at law or decree in equity in the Supreme Courts of the several States, the Supreme Court of District of Columbia, or the Supreme Court of any of the Territories, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty, or a statute of, or authority exercised under the United States, when the decision is against such right. The clause in our Constitution just cited is so nearly in the words of the Federal Statutes, and being on the kindred subject of appeals, we think it was clearly the object and purpose of the framers of the Constitution to confer jurisdiction on this court by appeal in those cases wherein the validity of an authority exercised under the United States is involved within the meaning of the said Acts of Congress. An examination of the various decisions of the Federal Supreme Court will demonstrate that the question is one requiring the nicest discrimination.

In Dupasseur vs. Rochereau, 21 Wallace, 130, the question for decision was whether a State court had given effect to a decree of a court of the United States, and it was asserted that the contention — that it had presented no Federal question. The Supreme Court of the United States said "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the
107 parties, a question is undoubtedly raised which, under the act of 1867 may be brought to this court for revision.

The case would be one in which a title or right is claimed under the authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution, and

it is clearly within the charts of appellate power given to this court over cases arising in and decided by the State courts." In Factors' and Traders' Insurance Company vs. Murphy, 111 U. S. 738, a court of the United States sitting in bankruptcy ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lien-holders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a State court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The State court decreed in favor of plaintiff, and a writ of error was prosecuted to the Supreme Court. In reversing the judgment of the State court it was said: "Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from encumbrances. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the (State) court the writ of error lies."

In Avery vs. Popper, 179 U. S. 305, the two cases last above
108 referred to were approvingly cited, and the rule was declared to be that where a controversy in the State court presented a contention as to the validity or proper construction of an order or decree rendered by the court of the United States, a Federal question was presented reviewable by the Supreme Court of the United States." In Missouri, Kansas and Texas Railway Co. vs. Smith, et al., 154 Mo. 300, it was ruled by this court on an application for a writ of prohibition against the Kansas City Court of Appeals to prevent that court from further proceeding in the case of Elliott vs. said Railroad Company, which had been appealed to that court from the Cooper circuit court and to further prohibit said court from carrying out the judgment entered in said cause, and to transfer the record and proceedings in the said cause to this court, on the ground that a Federal question was involved, that a suit in a State court on a bond given in an injunction suit in a Federal Court for attorney's fees, whether the said fees were paid for having the injunction dissolved or the injunction was only ancillary to the main object of an action at law, pending in said Federal Court, did not involve a Federal question in such a way as to give this court jurisdiction of the appeal although attorney's fees are not considered by Federal courts elements of damages in suits on injunction bonds and the State court has held that attorney's fees were recoverable in the suit on said bond. Thereupon a writ of error was sued out from the Supreme Court of the United States to the Kansas City Court of Appeals and the Supreme Court of the United States in 184 U. S. 530, re-

versed the judgment of the Kansas City Court of Appeals and held upon the authority of Tullock vs. Mulvane, 184 U. S. 497, that the claim of immunity from liability for attorney's fees as one of the elements of damage under the injunction bond, presented a Federal question, which was incorrectly decided by the Kansas City Court of Appeals in holding that it was proper to award the amount of such fees in enforcing the bond. Tullock vs. Mulvane and M. K. & T. Ry. Co. vs. Elliott, supra, cannot be reconciled with the decision of this court in M. K. & T. Ry Co. vs. Smith, et al., 154 Mo. 300. While these cases did not in terms overrule M. K. & T. Ry. Co. vs. Smith, et al., they did overrule the Kansas City Court of Ap-
109 peals, and the Supreme Court of the United States took jurisdiction of the appeal on the ground that the validity of an authority exercised under the United States was directly involved, which this court had denied in the case for prohibition. These cases sufficiently indicate the course of decision in the Supreme Court of the United States and as that court is the final authority as to what constitutes a Federal question, its decision must control. Now in the instant case, the question is presented what is the effect of the proceedings in bankruptcy filed in the District Court of the United States as against this action thereafter instituted in a court of Missouri. From the statement of the case, it will be observed that the circuit court held that the said proceedings in bankruptcy were no bar to a recovery by the plaintiff of its claims against the defendant, and the main insistence on this appeal is that the filing of the petition in bankruptcy was a caveat to all the world and thereafter all the property rights of the defendant passed under the jurisdiction of the bankrupt court and operated as an injunction against all other creditors and persons, to not thereafter interfere with the estate, and that the circuit court erred in not so holding and in giving judgment for the plaintiff.

That the United States District Court had jurisdiction to adjudicate the defendant a bankrupt is not questioned. That a petition to have it adjudged a bankrupt October 22, 1903, was filed, appears from the record. Afterwards this suit was brought in Jackson county against the defendant. On October 3rd, 1904, the United States District Court for the Northern District of Illinois, Southern Division, ordered that the Beekman Lumber Company of Kansas City, Missouri, be restrained and enjoined until the further order of said court from the further prosecution of this action in the circuit court of Jackson county. The defendant in the suit pleaded that injunctive order in abatement of this action and the circuit court decided against such plea. Whether rightfully or wrongfully the United States District Court exercised the authority of granting the injunction and it did so as a court of the United States, and the State court, it is charged, denied the validity of that injunc-
110 tion. In our opinion, this presents a case for the appellate jurisdiction of this court under section 12 of article 6 of the Constitution of this State.

2. We are thus brought to the important question in this case and that is the effect of the proceedings in bankruptcy filed in the United

States District Court for the Northern District of Illinois, as against this action thereafter brought in the circuit court of Jackson county. The question is divisible. First, what was the effect of the filing of the petition? On the part of the defendant it is insisted that the filing of the petition alone was a caveat to all the world and in effect an attachment and injunction. "Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication." Loveland in his work on Bankruptcy, page 15, speaking of the differences between the Bankrupt Acts of 1867 and 1898, says: "Fifth. Another important difference between the two acts is the time when property passes out of the bankrupt. Under the Act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of law under the Act of 1898 as of the date of the adjudication in bankruptcy." In Muller vs. Nugent, 184 U. S. 1-14, C. J. Fuller said: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world and in effect an attachment and injunction * * * and on adjudication, title to the bankrupt's property became vested in the trustee (section 70, 21 c. Act of July 1st, 1898, c. 541. 30 Stats. at Large, 565-552 (U. S. Comp. St. 1901, p. 3451, 3430) with actual constructive possession and placed in the custody of the bankruptcy court." "The adjudication operates as a seizure of the property of the bankrupt by which it is taken in custodia legis." In re Granite City Bank, 137 Fed. Rep. 821. One fact stands out prominently in this record and that is that this plea of want of jurisdiction on the part of the circuit court of Jackson county to render judgment against The Acme Harvester Co. is not made by a trustee in bankruptcy of said Harvester Company appointed by the United States District Court or by a receiver
111 appointed by said court to take charge of the property of the said Harvester Company, but is made by the defendant, the Acme Harvester Company itself. It is significant that this action was begun on December 7th, 1903, and the petition for bankruptcy was filed October 23, 1903, and the trial of this cause was had on the 20th of June, 1905, and yet no adjudication had ever been made up to the rendition of the judgment in this case that the said Harvester Company was a bankrupt. In the brief of the plaintiff filed in this court, it is said "An adjudication was refused on October 26, 1903, to which the defendant replies that an inspection of the record will show there has been no formal refusal of the adjudication.

The plea of jurisdiction in the bankrupt court was an affirmative one and the burden was on defendant. Certainly there was not a scintilla of evidence that defendant had been adjudged a bankrupt up to the time of the final judgment in this case in the Jackson county circuit court even though the filing of a petition may be and is a caveat to all the world, we think it is clear that the custody of the debtor's property does not pass to the trustee or receiver of the bankrupt court until adjudication or is ordered into the hands of a marshal or a receiver. Such is the plain reading of the statute and such the decisions cited by defendant itself. Section 70 Bankruptcy Act,

1898. But in addition the failure of defendant to show any adjudication of defendant as a bankrupt, the plaintiff affirmatively showed by a letter of the creditor's committee in charge of defendant's business, by its consent, and carrying on and liquidating the same, that Judge Kohlsaat refused to appoint a receiver and held that defendant was solvent. As to this defendant, we think there was a complete failure of proof of an adjudication of bankruptcy.

It is clear the bankrupt court refused to appoint a receiver and left defendant's property in the hands of a committee of the creditors, with the consent of defendant.

It was after this refusal of the Federal Court to take into its custody the property of defendant as a bankrupt that plain-
112 tiff began its action in the State court and attached money of the defendant in this State. Responding then to the first proposition, we are of the opinion that, the mere filing of a petition in bankruptcy without a subsequent adjudication of bankruptcy did not place the property of the defendant debtor in the custody of the District Court of the United States so as to render the doctrine of custodia legis applicable, and thereby deprive the circuit court of Jackson county of its jurisdiction by attachment over the property attached.

3. But notwithstanding, the mere filing of a petition which is not followed by an adjudication, cannot have the effect of placing the debtor's property *in custodia legis*, there remains still the further contention of defendant that the circuit court of Jackson county was bound to suspend and stay the proceedings in this case because the United States District Court granted an injunction against the plaintiff herein, specifically, by name, enjoining it from further prosecuting this suit, which resulted in the judgment from which this appeal was taken. Said injunction was granted October 2nd, 1904, on the petition of the defendant herein, as far as appears, without notice, or the service of a subpœna on plaintiff from the United States District Court. It was ruled in several cases under the Act of 1867, that injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under section 40 of the Act may be allowed and issued without notice; that provision in the judiciary act of 1793 (1 U. S. Stat. at Large, 334) forbidding the writ to be granted in a suit in equity, without notice to the adverse party, does not apply to proceedings in the district court under the bankrupt act. Ex parte Smith 12994 Fed. Cases. Ex parte Carlton, 2415 Fed. Cases. In Re Wallace, 17094 Fed. Cases. In Re Muller, 9912 Fed. Cases. The contention is that although the district court did not and would not adjudicate defendant a bankrupt and did not appoint a receiver, yet the cause was still pending in the District Court which had exclusive jurisdiction of the estate of defendant and consequently no other court could interfere with its power over
113 the estate. Unquestionably it is the settled law that "under the scheme of the bankrupt act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds *pari passu* among the creditors according to their re-

spective rights and priorities. Only one court, the court making the adjudication, collects, marshals, administers, determines priorities of the parties and directs the distribution of the assets." In Re Granite City Bank, 137 Fed. Rep. 818, but when the District Court of the domicile declines or refuses to adjudicate bankruptcy and leaves the property in the possession of the bankrupt or as in this case, a committee of creditors, by its consent, how is this exclusive jurisdiction infringed by a creditor going into another court of general jurisdiction and seeking to enforce his or its claim? It will be observed that the District Court neither appointed a receiver or ordered the marshal to take possession of the bankrupt estate but declined to do so, and left the property in the hands of the creditors' committee appointed by consent of defendant and this condition of affairs existed when plaintiff began this action by attachment. Had the United States District Court directed its marshal to seize and take charge of the property of the Harvester Company pending the hearing of the petition or appointed a receiver to do so, doubtless the circuit court of Jackson county would have suspended all proceedings in this case and awaited the action of the Federal Court in adjudicating said company a bankrupt but it did neither of those things, and has never adjudicated said company a bankrupt, but left the property in the hands of the debtor's creditors. Surely it was not the purpose of the Congress of the United States to permit a petition for involuntary bankruptcy to lie dormant in the District Court of the domicile of the debtor and that the District Court, with full knowledge that certain creditors of the alleged bankrupt were going ahead, collecting the assets and liquidating the indebtedness of said debtor, should months afterwards upon the application of the debtor himself enjoin another creditor from availing himself of another court to enforce his rights against such debtor.

114 The conditions are anomalous. This court fully recognizes the exclusive power in Congress to enact bankrupt laws and enforce them, but we find nothing in the Bankrupt Act of 1898, or its amendment in 1903, which gives countenance to a proceeding like this which amounts to no more than a cloak to shield this defendant from its creditors by permitting the conducting of its business, not by a receiver, marshal or trustee of a bankrupt court but by certain of its creditors, according to their notions. We think the injunction obtained against the plaintiff in this case, after a denial of the adjudication of bankruptcy and after a refusal of the District Court to take charge of the property was wholly unauthorized by the Bankrupt Act. We think the circuit court of Jackson county was not interfering with the jurisdiction of the bankrupt court because that court was not asserting its jurisdiction in any manner permitted or prescribed by the Act of Congress and hence we hold that the alleged proceedings in bankruptcy were no obstacle to the judgment of the circuit court of Jackson county.

4. It is urged, however, that error was committed because the circuit court directed the jury to return a verdict for the amount of said account and interest thereon at the rate of six per cent per annum from the date of the commencement of this action. Inasmuch as the

action was based upon the defendant's own written statement of the items of the account sued on and the balance therein admitted to be due and there was no testimony on the part of the defendant tending in any manner whatever to impeach the items of said account or the amount due thereon there would seem to have been nothing to submit to the jury unless the contention of defendant, that the court should have left it to the jury to calculate the interest and should not have computed the interest itself due plaintiff, from the date of the commencement of this action to the day of the trial, at six per cent per annum, is sound. By section 3075, R. S. 1899, "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable on written contracts, and
115 on accounts after they become due and demand of payment is made." It has often been ruled that the commencement of an action for money is sufficient demand. While interest is not given as a matter of course in actions of torts, surely it would not have been erroneous for the court to have directed the jury that plaintiff was entitled to interest on its account at the rate of six per cent from the date of the commencement of the suit and there is no claim that the interest actually allowed by the jury in obedience to the instruction of the court was not correctly calculated. We are forbidden by the statute to reverse judgments for errors or irregularities unless they materially affect the merits of the action. Section 865, R. S. 1899. To reverse and remand this judgment for another trial simply to have a jury calculate the interest again on the amount acknowledged by the defendant in writing to be due plaintiff, would be a clear violation of the statue. The judgment is affirmed.

Fox, P. J. and Burgess, J. concur.

JAS. B. GANTT, *J.*

116 And afterwards, to-wit, on the 22nd day of July, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LUMBER CO., Resp.,
v.
ACME HARVESTER CO., App.

Comes now the appellant and files its motion for rehearing and its motion to transfer this cause to court in banc.

Which said motion for rehearing is in words and figures as follows, to-wit:

117 In the Supreme Court of Missouri, Division No. 2.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Motion for Rehearing.

Now on this day comes the appellant, and moves the Court to grant it a re-hearing, and for ground of said motion does say, the opinion

of the court is in conflict with the controlling authorities herein to which the attention of the court was directed in the brief, and which the court did not consider in its opinion.

The attention of the Court is called to paragraphs 2, 3, 4 and 5 of the brief of the appellant, no portion of which is referred to in the opinion of the court.

Again, the court in its opinion recognized the power of the Federal Court in Illinois to enjoin the pending action, but the court thought that the injunction granted by the court in Illinois was an erroneous exercise of the power vested in that court. An erroneous order issued by a court of competent jurisdiction is not void, and cannot be the subject of a collateral attack.

Further argument on this motion for re-hearing is precluded by the fact that a motion has been filed to transfer the case to the court in banc, and this motion must of course be sustained under the language of the amendment creating this division of the court.

KARNES, NEW & KRAUTHOFF &
NEWMAN, NORTHRUP, LEVINSON &
BECKER, *Attorneys for Appellant.*

Copy received July 21, 1908.
STEWART TAYLOR,
For Respondent.

[Endorsed:] No. 13180. Beekman Lumber Co. vs. Acme Harvester Co. Motion for Re-hearing.

Which said motion to transfer to Court in Banc is in words and figures as follows, to-wit:

118 In the Supreme Court of Missouri, Division No. 2.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Motion to Transfer to Court in Banc.

Now on this day comes Acme Harvester Company, the losing party herein, and moves the court to transfer this cause to the court in banc for its decision, and for the ground of this motion, states that a federal question is involved herein.

The attention of the court is respectfully called to Section 4 of the constitutional amendment adopted in 1890. It is there provided "When a federal question is involved, the cause on the application of the losing party, shall be transferred to the court in banc for its decision."

R. S. 1899, page 95.

KARNES, NEW & KRAUTHOFF,
NEWMAN, NORTHRUP, LEVINSON &
BECKER, *Attorneys for Appellant.*

Copy received July 21, 1908.
STEWART TAYLOR,
Att'y for Respondent.

And afterwards, to-wit, on the 25th day of July, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LBR. CO., Resp.,
v.
ACME HARVESTER CO., App.

Now at this day, the court having fully considered and understood the motion heretofore filed by appellant, doth order that said cause be transferred to the court in banc.

[Endorsed:] No. 13180. Beekman Lumber Co. vs. Acme Harvester Co. Motion to transfer to court in banc.

119 And afterwards, to-wit, on the 2nd day of October, 1908, there was filed additional brief on behalf of appellant, which said additional brief is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, October Term, 1908. In Banc.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Additional Brief on Behalf of Appellant In Banc.

The opinion of Division No. 2, in this case, by the Hon. Jas. B. Gantt, judge of this court, handed down during the April term, 1908, of this court, is as follows:

"In the Supreme Court of Missouri, Division No. 2, April Term, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

"This cause originated in the Circuit Court of Jackson
120 county, December 2, 1903, in which the plaintiff, a corporation organized under the laws of the state of Missouri, sought to recover of the defendant, a corporation organized under the laws of Illinois, and having its chief office and place of business at Peoria, in said state, $1,453.58 for lumber sold and delivered by the plaintiff to the defendant, an itemized account of which was annexed to and filed with the petition. On December 24th, 1903, a motion was filed by the defendant to stay the proceedings on the ground that there was pending against the defendant in the District

Court of Illinois a petition in involuntary bankruptcy. On January 11th, 1904, motion to stay the proceedings was sustained. On March 30th, 1904, the plaintiff filed its motion to set aside the stay of proceedings, which motion was sustained on May 14th, 1904. On October 12th, 1904, defendant filed an answer in the nature of a plea to the jurisdiction and a plea to the merits in the following words: 'Now on this day comes the Acme Harvester Company and appearing especially for the purpose of this plea only pleads to the jurisdiction of this court and says this cause should not be prosecuted. Defendant further avers that heretofore in the district court of the United States for the Northern district of this Southern division a court of competent jurisdiction in that behalf the petition was filed to adjudicate Acme Harvester Company a bankrupt. Thereafter it was by said court ordered and adjudged that Beekman Lumber Company be enjoined until the further order of that court from maintaining this proceeding or prosecuting this action. The proceedings resulting in such injunction were duly had and the order and judgment of injunction were rendered. The defendant by way of protestation and for answer to the petition of the plaintiff denies generally each and every allegation therein contained.' On June 20th, 1903, plaintiff filed a reply in words as follows: 'Plaintiff, for reply to the answer *to* the defendant, denies each and every allegation of new matter therein made or contained. For further reply plaintiff shows to the court that the matters set forth in defendant's answer were set forth in defendant's motion to stay proceedings
121 herein filed December 24, 1903, which motion was by this court sustained; that afterwards on the — day of —— 1904, this plaintiff filed its motion to set aside said stay order on the ground named therein that said matters did not entitle defendant to a stay; that said motion was sustained and no appeal was taken therefrom, and thereby the matters and things set forth in defendant's answer were adjudged against it and became *res adjudicata,* and the defendant cannot now be heard to urge the same, wherefore plaintiff prays judgment as in his petition.' The case was tried at the April term, 1905, and at the close of the evidence the trial court directed the jury to return a verdict in favor of the plaintiff and thereupon in accordance with the directions of the court, the jury did return a verdict in favor of the plaintiff and assess the damages at the sum of $1,587.52, and judgment was rendered accordingly in favor of the plaintiff against the defendant, and the court further found that the defendant, not having denied the grounds of attachment, the same stood confessed as true and plaintiff's attachment was sustained and the garnishee Union Avenue Bank of Commerce having admitted in its answer the possession of $1,342.45, the money of the defendant, it was further considered and adjudged by the court that plaintiff have and recover of and from said garnishee the said sum so confessed and have execution therefor, and that the garnishee be allowed $25.00 as attorney fees, and that defendant be given credit on the judgment for whatever sum the plaintiff may collect from the garnishee. In due time the defendant filed its motion for new trial and in arrest of judgment, which was heard and overruled by the

court, and defendant excepted, thereupon the appeal was granted to this court in due form on July 15th, 1905, and leave was given the defendant to file a bill of exceptions, which was by the court allowed, signed and sealed and made part of the record. On the trial the plaintiff offered in evidence proof of the delivery of the goods sued for and a letter from the defendant giving a detailed statement of the lumber shipped by plaintiff and the balance due plaintiff from the defendant, showing the sum to be $1,453.58, and rested.

"On the part of the defendant the evidence was as follows:

122 A petition in bankruptcy filed against the defendant in the District Court of the United States for the Northern District of Illinois Southern Division, on the 23rd of November, 1903, in behalf of certain creditors in which it was charged that the Acme Harvester Company was insolvent and had committed certain acts of bankruptcy, to-wit: In giving illegal preferences to certain other creditors. Second, a petition for an injunction against the plaintiff, Beekman Lumber Company, from prosecuting this present action, which said petition for injunction was filed October 3, 1904. Third, an order granting the injunction until the further order of the said district court. In rebuttal the plaintiff offered and read in evidence a letter from the defendant, by its vice-president, H. L. Stone, calling the plaintiff's attention to the fact that it had not as yet signed 'the creditors' committee' agreement whereby the affairs of the Acme Harvester Company would be placed in the hands of five of the heaviest creditors, for the purpose of working up its assets and gradually liquidating its indebtedness and calling attention to the fact that Judge Kohlsaat had stopped the bringing of the suits against the company or endeavoring to throw it into bankruptcy, he having decided that it was solvent, and that the only reasonable and fair way to handle the business was through a creditors' committee selected by the heaviest creditors, also a letter from Messrs. Newman, Northrup, Levinson and Becker to the plaintiff, calling *their* attention to this creditors' agreement and the steps to be taken for the liquidation of the Acme indebtedness. Also a letter from the creditors' committee to the plaintiff as follows:

"'GENTLEMEN: In our letter of October 24th, we advised you a certain law firm of this city had caused a petition in bankruptcy to be filed against the Acme Harvester Company and made an application for an immediate appointment of a receiver. We are pleased to report that the motion for a receiver was heard this morning by the Honorable C. C. Kohlsaat, Federal Judge in Chicago, who refused to appoint a receiver, and said: "This estate is a very large one and is

123 in the hands of a committee of reliable creditors. It is my judgment that the creditors ought to manage and control the estate, the creditors can produce results much better than any receiver in handling a large manufacturing concern like the Acme Harvester Company." At the close of the argument the court referred the matter to Judge David McCulloch, referee in bankruptcy, at Peoria, to inquire into the truth of the allegations of the petition and to ascertain whether the petitioning creditors have any standing or right to file a petition in bankruptcy. There is really

only one creditor left in the bankruptcy proceedings although persistent efforts have been made by the lawyers to get other creditors to join.

(Signed) By D. L. FORGAN AND OTHERS,
Creditors' Committee.'

"Plaintiff also offered in evidence another letter from this creditors' committee calling attention to the proposed reorganization of the company, and stating that they had received letters from about two-thirds of the creditors, eighty per cent of whom desired stock, and the rest preferred to accept fifty per cent in cash and asking plaintiff to determine whether they would take stock or cash. Plaintiff also offered, in evidence, a report of the defendant to the United States District Court of the business of the concern, a statement of its assets and liabilities and the conduct of the business since January 1st, 1905.

"1. The first proposition for consideration is whether this court has jurisdiction of this appeal, as the amount of the judgment appealed from is only $1,597.52. We think it is apparent that if this court has jurisdiction at all of this appeal, it must be found in Section 12 of Article 6, of the Constitution of this State, which gives this court jurisdiction in cases, 'where the validity of a treaty or a statute of, or authority exercised under the United States is drawn in question.' The validity of a treaty or a statute of the United States is nowhere challenged in this record so that the question is narrowed down to the proposition whether 'authority exercised under the United States' is drawn in question. As to what is drawn in question the validity of the authority exercised under the
124 United States has often been the subject of judicial interpretation. The author of this provision of Section 12 of Article 6 of our Constitution, obviously had in mind the acts regulating appeals to the Supreme Court of the United States from the Supreme Courts of the several States and the District of Columbia, and the Supreme Courts of the Territories. (Sect. 709, R. S. U. S. 1878, 23 U. S. Statutes at Large, 443.) By these acts an appeal or writ of error is allowed from any judgment at law or decree in equity in the Supreme Courts of the several States, the Supreme Court of District of Columbia, or the Supreme Court of any of the Territories, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity or a treaty, or a statute of, or authority exercised under the United States, when the decision is against such right. The clause in our Constitution just cited is so nearly in the words of the Federal Statutes, and being on the kindred subject of appeals, we think it was clearly the object and purpose of the framers of the Constitution to confer jurisdiction on this court by appeal in those cases wherein the validity of an authority exercised under the United States is involved within the meaning of the said Acts of Congress. An examination of the various decisions of the Federal Supreme Court will demonstrate that the question is one requiring the nicest discrimination.

"In *Dupasseur* v. *Rochereau,* 21 Wallace, 130, the question for decision was whether a State court had given due effect to a decree of a court of the United States, and it was asserted that the contention — that it had presented no Federal question The Supreme Court of the United States said: 'Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision.

" 'The case would be one in which a title or right is claimed under the authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit
125 Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution, and it is clearly within the charts of appellate power given to this court over cases arising in and decided by the State Courts.' In *Factors and Traders Insurance Company* v. *Murphy,* 111 U. S., 738, a court of the United States, sitting in bankruptcy, ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a State court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The State court decreed in favor of plaintiff, and a writ of error was prosecuted to the Supreme Court. In reversing the judgment of the State court it was said: 'Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from encumbrances. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the (State) court the writ of error lies.' In *Avery* v. *Popper,* 179 U. S., 305, the two cases last above referred to were approvingly cited, and the rule was declared to be that where a controversy in the State court presented a contention as to the validity or proper construction of an order or decree rendered by the court of the United States, a Federal question was presented reviewable by the Supreme Court of the United States.' In *Missouri, Kansas and Texas Railway Company* v. *Smith, et al.,* 154 Mo., 300, it was ruled by this court, on an applica-
126 tion for a writ of prohibition against the Kansas City Court of Appeals to prevent that court from further proceeding in the case of *Elliott v. said Railroad Company,* which had been ap-

pealed to that court from the Cooper Circuit Court, and to further prohibit said court from carrying out the judgment entered in said cause, and to transfer the record and proceedings in the said cause to this court, on the ground that a Federal question was involved, that a suit in a State court on a bond given in an injunction suit in a Federal Court for attorneys' fees, whether the said fees were paid for having the injunction dissolved or the injunction was only ancillary to the main object of an action at law, pending in said Federal Court, did not involve a Federal question in such a way as to give this court jurisdiction of the appeal although attorneys' fees are not considered by Federal courts elements of damages in suits on injunction bonds and the State court had held that attorneys' fees were recoverable in the suit on said bond. Thereupon a writ of error was sued out from the Supreme Court of the United States to the Kansas City Court of Appeals, and the Supreme Court of the United States in 184 U. S., 530, reversed the judgment of the Kansas City Court of Appeals and held upon the authority of *Tullock* v. *Mulvane*, 184 U. S., 497, that the claim of immunity from liability for attorneys' fees as one of the elements of damages under the injunction bond, presented a Federal question, which was incorrectly decided by the Kansas City Court of Appeals in holding that it was proper to award the amount of such fees in enforcing the bond. *Tullock* v. *Mulvane*, and *M., K. & T. Ry. Co.* v. *Elliott, supra*, cannot be reconciled with the decision of this court in *M., K. & T. Ry. Co.* v. *Smith, et al.*, 154 Mo., 300. While these cases did not in terms overrule *M., K. & T. Ry. Co.* v. *Smith, et al.*, they did overrule the Kansas City Court of Appeals, and the Supreme Court of the United States took jurisdiction of the appeal on the ground that the validity of an authority exercised under the United States was directly involved, which this court had denied in the case for prohibition. These cases sufficiently indicate the course of decision in the Supreme Court of the United States, and as that
127 court is the final authority as to what constitutes a Federal question, its decision must control. Now, in the instant case, the question is presented what is the effect of the proceedings in bankruptcy filed in the District Court of the United States as against this action thereafter instituted in a court of Missouri. From the statement of the case, it will be observed that the Circuit Court held that the said proceedings in bankruptcy were no bar to a recovery by the plaintiff of its claims against the defendant, and the main insistence on this appeal is that the filing of the petition in bankruptcy was a caveat to all the world, and thereafter all the property rights of the defendant passed under the jurisdiction of the bankrupt court and operated as an injunction against all other creditors and persons, to not thereafter interfere with the estate, and that the Circuit Court erred in not so holding and in giving judgment for the plaintiff.

"That the United States District Court had jurisdiction to adjudicate the defendant, a bankrupt, is not questioned. That a petition to have it adjudged a bankrupt, October 22, 1903, was filed, appears from the record. Afterwards this suit was brought in Jack-

son County against the defendant. On October 3rd, 1904, the United States District Court for the Northern District of Illinois, Southern Division, ordered that the Beekman Lumber Company of Kansas City, Missouri, be restrained and enjoined until the further order of said court from the further prosecution of this action in the Circuit Court of Jackson County. The defendant in the suit pleaded that injunctive order in abatement of this action, and the Circuit Court decided against such plea. Whether rightfully or wrongfully the United States District Court exercised the authority of granting the injunction and it did so as a court of the United States, and the State court, it is charged, denied the validity of that injunction. In our opinion, this presents a case for the appellate jurisdiction of this court under Section 12 of Article 6, of the Constitution of this State.

"2. We are thus brought to the important question in this case, and that is the effect of the proceedings in bankruptcy filed in the United States District Court for the Northern District of Illinois, as
128 against this action thereafter brought in the Circuit Court of Jackson County. The question is divisible. First, what was the effect of the filing of the petition? On the part of the defendant it is insisted that the filing of the petition alone was a caveat to all the world and in effect an attachment and injunction: 'Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication.' Loveland, in his work on Bankruptcy, page 15, speaking of the differences between the bankrupt Acts of 1867 and 1898, says: 'Fifth. Another important difference between the two acts is the time when property passes out of the bankrupt. Under the Act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of law under the Act of 1898, *as of the date of the adjudication in bankruptcy,*' In *Muller* v. *Nugent,* 184 U. S., 1-14, C. J. Fuller said: 'It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect, an attachment and injunction * * * and on adjudication, title to the bankrupt's property became vested in the trustee (Section 70, 21 c, Act of July 1st, 1898, c. 541. 30 Stats. at Large, 565-552, U. S. Comp. St. 1901, pp. 3451, 3430), with actual constructive possession and placed in the custody of the bankruptcy court.' 'The adjudication operates as a seizure of the property of the bankrupt by which it is taken in *custodia legis.*' *In re Granite City Bank,* 137 Fed. Rep., 821. One fact stands out prominently in this record and that is that this plea of want of jurisdiction on the part of the Circuit Court of Jackson County to render judgment against the Acme Harvester Company is not made by a trustee in bankruptcy of said Harvester Company, appointed by the United States District Court, or by a receiver appointed by said court to take charge of the property of the said Harvester Company, but is made by the defendant, the Acme Harvester Company, itself. It is significant that this action was begun on December 7th, 1903, and the petition for bankruptcy was filed October 23, 1903, and the trial of this cause

was had on the 20th of June, 1905, and yet no adjudication
129 had ever been made up to the rendition of the judgment in this case that the said Harvester Company was a bankrupt. In the brief of the plaintiff filed in this court, it is said 'An adjudication was refused on October 26, 1903, to which the defendant replies that an inspection of the record will show there has been no formal refusal of the adjudication.

"The plea of jurisdiction in the bankrupt court was an affirmative one and the burden was on defendant. Certainly there was not a scintilla of evidence that defendant had been adjudged a bankrupt up to the time of the final judgment in this case in the Jackson County Circuit Court, even though the filing of a petition may be and is a caveat to all the world, we think it is clear that the custody of the debtor's property does not pass to the trustee or receiver, or the bankrupt court until adjudication, or is ordered into the hands of a marshal or a receiver. Such is the plain reading of the statute, and such the decisions cited by defendant itself. (Section 70, Bankruptcy Act, 1898.) But in addition the failure of defendant to show any adjudication of defendant as a bankrupt, the plaintiff affirmatively showed, by a letter of the creditor's committee in charge of defendant's business, by its consent, and carrying on and liquidating the same, that Judge Kohlsaat refused to appoint a receiver and held that defendant was solvent. As to this defendant, we think there was a complete failure of proof of an adjudication of bankruptcy.

"It is clear the bankrupt court refused to appoint a receiver and left defendant's property in the hands of a committee of the creditors, with the consent of defendant.

"It was after this refusal of the Federal Court to take into its custody the property of defendant as a bankrupt, that plaintiff began its action in the State court and attached money of the defendant in this State. Responding then to the first proposition, we are of the opinion that the mere filing of a petition in bankruptcy, without a subsequent adjudication of bankruptcy, did not place the property of the defendant debtor in the custody of the District Court of the United States so as to render the doctrine of *custodia legis*
130 applicable, and thereby deprive the Circuit Court of Jackson County of its jurisdiction by attachment over the property attached.

"3. But notwithstanding, the mere filing of a petition which is not followed by an adjudication, cannot have the effect of placing the debtor's property in *custodia legis*, there remains still the further contention of defendant that the Circuit Court of Jackson County was bound to suspend and stay the proceedings in this case because the United States District Court granted an injunction against the plaintiff herein, specifically, by name, enjoining it from further prosecuting this suit, which resulted in the judgment from which this appeal was taken. Said injunction was granted October 2nd, 1904, on the petition of the *defendant herein*, as far as appears, without notice, or the service of a subpœna on plaintiff from the United States District Court. It was ruled in several cases, under

the Act of 1867, that injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under Section 40 of the Act may be allowed and issued without notice; that provision in the judiciary act of 1793 (1 U. S. Stat. at Large, 334), forbidding the writ to be granted in a suit in equity, without notice to the adverse party, does not apply to proceedings in the District Court under the bankrupt act. *Ex parte* Smith, 12994 Fed. Cases. *Ex parte* Carlton, 2415 Fed. Cases. *In Re* Wallace, 17094 Fed. Cases. *In Re* Muller, 9912 Fed. Cases. The contention is that although the district court did not and would not adjudicate defendant, a bankrupt, and did not appoint a receiver, yet the cause was still pending in the District Court which had exclusive jurisdiction of the estate of defendant, and consequently no other court could interfere with its power over the estate. Unquestionably it is the settled law that "under the scheme of the bankrupt act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds *pari passu* among the creditors according to their respective rights and priorities. Only one court, the court making the adjudication, collects, marshals, administers, determines
131 priorities of the parties and directs the distribution of the assets.' *In Re Granite City Bank,* 137 Fed. Rep., 818, but when the District Court of the domicile declines or refuses to adjudicate bankruptcy and leaves the property in the possession of the bankrupt or as in this case, a committee of creditors, by its consent, how is this exclusive jurisdiction infringed by a creditor going into another court of general jurisdiction and seeking to enforce his or its claim? It will be observed that the District Court neither appointed a receiver or ordered the marshal to take possession of the bankrupt estate but declined to do so, and left the property in the hands of the creditor's committee appointed by consent of defendant, and this condition of affairs existed when plaintiff began this action by attachment. Had the United States District Court directed its marshal to seize and take charge of the property of the Harvester Company pending the hearing of the petition, or appointed a receiver to do so, doubtless the Circuit Court of Jackson County would have suspended all proceedings in this case and awaited the action of the Federal Court in adjudicating said company a bankrupt, but it did neither of these things, and has never adjudicated said company a bankrupt, but left the property in the hands of the debtor's creditors. Surely it was not the purpose of the Congress of the United States to permit a petition for involuntary bankruptcy to lie dormant in the District Court of the domicile of the debtor, and that the District Court, with full knowledge that certain creditors of the alleged bankrupt were going ahead, collecting the assets and liquidating the indebtedness of said debtor, should months afterwards, upon the application of the debtor himself, enjoin another creditor from availing himself of another court to enforce his rights against such debtor.

"The conditions are anomalous. This court fully recognizes the exclusive power in Congress to enact bankrupt laws and enforce them, but we find nothing in the Bankrupt Act of 1898, or its amendment

in 1903, which gives countenance to a proceeding like this which amounts to no more than cloak to shield this defendant from its creditors by permitting the conducting of its business, not by a receiver, marshal or trustee of a bankrupt court but by certain
132 of its creditors, according to their notions. We think the injunction obtained against the plaintiff in this case, after a denial of the adjudication of bankruptcy and after a refusal of the District Court to take charge of the property was wholly unauthorized by the Bankrupt Act. We think the Circuit Court of Jackson County was not interfering with the jurisdiction of the bankrupt court because that court was not asserting its jurisdiction in any manner permitted or prescribed by the Act of Congress and hence we hold that the alleged proceedings in bankruptcy were no obstacle to the judgment of the Circuit Court of Jackson County.

"4. It is urged, however, that error was committed because the Circuit Court directed the jury to return a verdict for the amount of said account and interest thereon at the rate of six per cent per annum from the date of the commencement of this action. Inasmuch as the action was based upon the defendant's own written statement of the items of the account sued on and the balance therein admitted to be due, and there was no testimony on the part of the defendant tending in any manner whatever to impeach the items of said account or the amount due thereon there would seem to have been nothing to submit to the jury unless the contention of defendant, that the court should have left it to the jury to calculate the interest and should not have computed the interest itself due plaintiff, from the date of the commencement of this action to the day of the trial, at six per cent per annum, is sound. By Section 3075, R. S., 1899, 'Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable on written contracts, and on accounts after they become due and demand of payment is made.' It has often been ruled that the commencement of an action for money is sufficient demand. While interest is not given as a matter of course in actions for torts, surely it would not have been erroneous for the court to have directed the jury that plaintiff was entitled to interest on its account at the rate of six per cent from the
133 date of the commencement of the suit and there is no claim that the interest actually allowed by the jury, in obedience to the instruction of the court, was not correctly calculated. We are forbidden by the statute to reverse judgments for errors or irregularities unless they materially affect the merits of the action. (Section 865, R. S., 1899.) To reverse and remand this judgment for another trial simply to have a jury calculate the interest again on the amount acknowledged by the defendant in writing to be due plaintiff, would be a clear violation of the statute. The judgment is affirmed.

Fox, P. J., and Burgess, J., concur.

JAS. B. GANTT, *Judge.*"

134 *Additional Brief.*

We desire to call the court's attention to the following facts in addition, to the matters set out in appellant's brief and appellant's reply brief filed in Division No. 2 of this court at the time the case was presented to Division No. 2.

I.

It is contended by the respondent that the United States District Court, on the 26th day of October, 1905, refused to adjudicate the defendant a bankrupt. By referring to the abstract of record it will be found that the only evidence offered by the respondent to establish this fact was a letter introduced in evidence as Exhibit "1," dated October 26th, 1903, from a creditor's committee. In this letter it is stated that the Honorable C. C. Kohlsaat, Federal Judge in Chicago, refused to appoint a receiver for the appellant herein (Abstract of Record, pages 28-29). This letter it will be noted was admitted in evidence over the objection of the defendant (appellant), and this is the only evidence in the record to prove that the United States District Court either refused to appoint a receiver, or refused to adjudicate the appellant herein a bankrupt.

We submit that there was no proper foundation made for the introduction of these various letters from the creditor's com-
135 mittee, and that if the facts stated in these various letters were true, that the letters written by the creditor's committee were not admissible to prove the action taken by the United States District Court on the application for the appointment of a receiver or adjudicate in bankruptcy.

Eliminating the letters from the creditor's committee which were admitted in evidence over the objection of the appellant, which are found in the Abstract of Record on pages 28-32, we find the record on behalf of appellant shows that a petition in bankruptcy was filed against the appellant herein in the District Court of the United States for the Northern District of Illinois, Southern Division, on the 23rd day of November, 1903 (Abstract of Record, pages 17-21). That on December 7th, 1903, the respondent herein filed an action in attachment in the Circuit Court of Jackson County, Missouri, against the appellant (Abstract of Record, pages 1-3), and the order restraining the respondent from further prosecuting this action made by the District Court of the United States for the Northern District of Illinois, Southern Division, on October 2nd, 1904 (Abstract of Record, page 24), and in direct violation of the order so made the respondent has prosecuted this action.

It is not contended that the District Court of the United States, in which the petition in bankruptcy was filed, did not have authority to stay proceedings against the bankrupt and against the property of the bankrupt pending the bankruptcy proceedings (See
136 authorities in appellant's statement and brief, filed in Division No. 2 of this court, pages 6, 7, 8 and 9).

II.

The United States District Court for the Northern District of Illinois, Southern Division, upon the filing of the petition in bankruptcy acquired jurisdiction over the estate of the bankrupt and of the bankrupt, appellant herein. It had jurisdiction to issue the order staying the proceedings of the respondent herein, a creditor of the bankrupt, whereby the respondent was attempting to enforce a claim by attachment against the property of the alleged bankrupt.

It is contended, however, by the respondent that inasmuch as the court refused, or had refused, to appoint a receiver to take charge of the property of the alleged bankrupt, that the order restraining the respondent herein from further prosecuting this action was erroneously or improvidently granted, and therefore the respondent was not bound to obey the order issued by the United States District Court.

It is a well established rule of law that, where a court has jurisdiction of the parties and subject-matter, that the action of the court cannot be attacked collaterally on the ground that the court decided erroneously, but the only remedy is by appeal or a motion to dissolve the erroneous order.

In the case of Schubach v. McDonald, 179 Mo., 163, 182, the rule is thus stated:

"If a court has a power to act, its jurisdiction is nowise
137 impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, in no way affects the jurisdiction of the court."

The same principle is announced in the case of State, ex rel. v. Stovie, 194 Mo., 14, 48, and the case of Schubach v. McDonald, supra, is cited by the court with approval.

In the case of Cove v. Rickett, 111 Mo. App., 105, 112, the court said:

"Whether it had power to act in the particular case in view of the pendency of the prior suit was a proposition for the Federal Court to adjudicate before proceeding. If it decided the proposition erroneously its judgment could be reversed on appeal, but cannot be attacked collaterally. A Circuit Court of the United States is of restricted but not of inferior jurisdiction. If it has jurisdiction over the subject-matter of a particular cause, that is, power to determine the general question involved, it may proceed with that cause if the requisite facts exist to authorize it to exercise its jurisdiction. One fact often indispensable to an exercise of jurisdiction is that the controversy must be between citizens of different states. A federal court may find erroneously as to this fact and proceed to a judgment when it should not. If it does, its judgment, nevertheless, is exempt from collateral attack on the ground that the fact was non-

existent, but may be reversed by appeal or writ or error for the erroneous decision. Unless thus reversed the matter remains *res judicata.*"

In the case of State v. Horner, 16 Mo. App., 191, 192, the rule is thus stated by the court:

138 "If the Circuit Court had jurisdiction to render the decree set out in the petition it was a contempt of court for the officer of the corporation to disobey it, no matter how improvident or erroneous the making of it may have been. * * * But if the court had no jurisdiction to render the decree, no contempt was committed in disobeying it."

In the case of State, ex rel. Carroll v. Campbell, 25 Mo. App., 639, the defendants were cited to show cause why they should not be punished for a violation of the injunction order issued by the Circuit Court. In their return the defendants set up that on the face of the record the relator was never entitled to an injunction on the facts stated. In reference to this matter the court said:

"The return avers that on the face of the record it appears that the case is not one in which an injunction should ever have been issued, and that the relator was never entitled to an injunction on the facts stated. If this proposition were true, it would be wholly irrelevant and immaterial to the matter in hand. That injunction was, in fact, granted by a competent authority, held to be such under the laws of this State, is sufficient to render the defendants liable as for a contempt, as they have willfully disobeyed it as the information charges."

"It is well-settled and the books are full of cases holding, that a defendant who has disobeyed an injunction cannot justify his disobedience by showing that the injunction was improvidently or erroneously granted or irregularly served; and that if the injunction has been improperly allowed the only remedy is by a motion to vacate or dissolve it."

10 Encyc. of Pl. & Pr., page 1105.

"Disobedience of an injunction order cannot be justified by setting up that it was improvidently or erroneously granted.

139 Until the order is vacated it must be obeyed, unless it can be shown that it is absolutely void the order must be questioned by direct proceedings, to review it, not by disobedience."

16 Am. & Eng. Encyc. of Law, 2d Ed., page 438.

"Though an order of court on an injunction may be improperly or improvidently granted, it must be obeyed until vacated or dissolved. No matter how unreasonable in its terms, or unjust in its operation it may be, disobedience of it is a contempt."

7 Am. & Eng. Encyc. of Law, 2d Ed., page 56.

"The fact that the mandate, order or judgment is merely erroneous is no excuse for violating it where the court possessed jurisdiction of the subject-matter and the parties litigant. So the fact that

the order was improvidently granted or irregularly obtained will not excuse disobedience."

9 Cyc., page 11.

"Where the injunction is void and not merely voidable, as where the court had no jurisdiction, disobedience thereof is not punishable. Where, however, the court had jurisdiction, the fact that an order of injunction is merely erroneous, or was improvidently granted or irregularity obtained, is no excuse for violating it, the remedy in such cases being by appeal or writ of error from the order of the decree. So, although the injunction is broader than authorized by the bill, it must be obeyed."

22 Cyc., page 1009.

In Re Sawyer, 124 U. S., 200, the court held that an order committing a party for contempt is a nullity if the court had no authority to make it, but unless absolutely void, it must be obeyed, the court said:

140 "As this court has often said, where a court has jurisdiction it has a right to decide each question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. But if it act without au-hority its judgment and orders are regarded as nullities. They are not voidable but simply void."

In the case of Ballard v. Erhart, 35 Kan., 616, Ballard was adjudged in contempt for violating the injunction, and adjudged to pay for his disobedience a fine of $100.00 together with all the costs. The court said:

"The court had jurisdiction of the parties and of the subject-matter, and the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been dissolved."

In the case of State, ex rel, v. Pierce, 51 Kan., 241, 32 Pac. Rep., 924, the defendant was adjudged guilty of contempt of court for a violation of an injunction issued by the District Court of Barber County. On appeal it was contended by Pierce that the District Court had no authority to issue the order, and one of the reasons for which it was contended that the court had no authority to make the order was that the affidavit to the petition asking for the injunction was insufficient, and was not signed by the plaintiff or his agent, but by a stranger to the record, and for this reason the court had no authority to issue the order. The court said:

"We do not deem it necessary to decide whether this was a sufficient verification of the petition for the purpose of granting an injunction, but we do hold that the order of injunction was not void because of a defective affidavit. It was, at most, erroneous for the District Judge to issue the injunction, and the error, if any, could only be

141 corrected by a proper proceeding in that action. The defendant could not treat the order of injunction as absolutely void for that reason."

The same rule is announced in the Federal Court. The case of

United States v. Debbs, 64 Fed., 724, 739, was a proceeding for contempt against the defendant Debbs and others, for violation of an injunction. It was contended on behalf of the defendants that the court had no authority and was without jurisdiction to issue the order of injunction against the defendants. The court said:

"If the injunction was, for any reason, totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its jurisdiction in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ."

In the case of Blake v. Nesbitt, 144 Fed., 279, 284, the defendant was cited to appear and show cause why he should not be punished for contempt of court for disobedience of a preliminary injunction or restraining order. It was contended, on behalf of the defendant, that the restraining order issued by the court should not have been made, for the reason that the defendant was claiming a right to the funds which he was enjoined from disposing of, as having been paid to him by the bankrupt as a creditor. In passing upon this question the court said:

"It is the well-established rule in procedure for contempt of the disobedience of an injunction order, that the defendant when cited to appear cannot purge himself of the contempt by going into the merits of the case to determine whether or not the discretion of the court was properly exercised in granting a temporary re-
142 straining order, or whether or not on final hearing the injunction should be dissolved. It is his duty to observe and obey the order implicitly as long as it stands unrevoked; and if he is of the opinion, or has been advised by his counsel, that the order was improvidently issued it is his duty to apply to the court for a modification or construction of its provisions, as it would lead, not only to confusion or uncertainty but would be destructive of the very purpose of a temporary restraining order, if the party against whom the injunction had been issued should be allowed to judge of the propriety of the necessity of the relief sought."

The same rule is announced in other jurisdictions. In Forrest v. Price, 29 Atl., 215, 52 N. J. Eq., 16, it was held that it was no excuse for contempt of an order of court that the order be founded on error of law or fact. The error must be questioned by direct proceedings to review the order, not by disobedience.

In the case of People, ex rel. Cauffman v. Van Bueren, 136 N. Y., 252, 32 N. E. Rep., 775, 20 L. R. A., 446, the rule is thus stated:

"No matter how erroneous the action of the court may have been in taking cognizance of the suit and awarding a mandatory process, unless there was an entire absence of judicial authority to act in the premises, it was the duty of the defendants to obey its commands until they had been revoked by an order made in the action in which they had been issued either upon motion or appeal, or by some other method of direct review."

In the case of Tolman v. Jones, et al., 114 Ill., 147, 28 N. E., 464, it is said:

"The principle is of universal force that the order or judgment of

a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous."

143 In the case of Clark v. Burke, et al., 163 Ill., 334, 45 N. E. Rep., 235, the court said:

"It is well settled that, in a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrantly it may appear to be so."

In the case of Loven v. People, 158 Ill., 159, 42 N. E. Rep., 82, it was held that it was no defence to a person punished for contempt in violating an injunction, that the injunction was broader than the prayer of the bill on which it was issued.

In the case of Central Union Telephone Co. v. State, ex rel., etc., 110 Ind., 203, 12 N. E. Rep., 136, the court said:

"It is further argued that the case in which the order of injunction was granted, was for the recovery of real estate, and that in such a case an order of injunction could not issue. But, if counsel were right in this position, it would not avail them in this collateral proceeding; for there was unquestionably jurisdiction of the subject and of the person, and a mere error in granting the relief could not be made available except by a direct attack."

To the same effect are the following authorities:

Wm. Rogers & Co. v. Rogers, 38 Conn., 212;
Kerfoot v. People, 51 Ill. App., 410;
State v. Baldwin, 57 Ia., 266;
Una v. Dodd, 39 N. J. Eq., 173;
People v. Sturtevant, 9 N. Y., 263, 59 Am. Dec., 536;
People v. McKane, 78 Hun (N. Y.), 161;

144 Howe v. Willard, 40 Vt., 662;
Stimpson v. Putnam, 41 Vt., 328;
Kaehler v. Halpin, 59 Wis., 40, 17 N. W. Rep., 868;
State v. Harper's Ferry Bridge Co., 16 W. Va., 877;
State v. Harper's Ferry Bridge Co., 16 W. Va., 788;
Ex parte Fil Ki, 79 Cal., 584, 21 Pac., 974;
People v. 10th Jud. Dist. Ct., 29 Col., 182, 68 Pac. Rep., 242;
Davis v. Reed, 14 Md., 152;
State v. Moore Co. Dist. Ct., 78 Minn., 464, 81 N. W., 323;
State v. Markuson, 7 N. Dak., 155, 73 N. W. Rep., 82;
State v. Gray, 42 Ore., 261, 70 Pac. Rep., 904, 71 Pac., 978.

We submit that in the case at bar even though it may be held that the order made by the United States District Court was erroneously or improvidently issued, the respondent herein was bound to obey the order until it was set aside or dissolved. There is no showing whatever on behalf of the respondent that it made any effort whatever to have this order restraining said respondent from prosecuting this action set aside, or modified in any way, or that any steps whatever were taken by the respondent to have the restraining order dissolved. From the foregoing authorities it will be found that if the respondent herein was dissatisfied with the order entered by the

United States District Court, or that the order of the United
145 States District Court was erroneously or improvidently issued, the respondent herein should have taken some steps before proceeding with the prosecution of this case, to have the order so made by the United States District Court dissolved.

The respondent herein should not have the support of this court in violating an injunction issued by a court having jurisdiction of the subject-matter and of the parties therein, and should not be permitted in this action to show or plead that the order made by the United States District Court was erroneously or improvidently issued.

We respectfully submit that the judgment should be reversed, and the cause remanded with directions to stay proceedings herein until the dismissal of the petition in bankruptcy or adjudication thereof.

NEWMAN, NORTHRUP, LEVINSON & BECKER, AND
KARNES, NEW & KRAUTHOFF,
Attorneys for Appellant.

146 And afterwards, to-wit, on the 29th day of October, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LBR. CO., Resp.,
v.
ACME HARVESTER CO., App.

Come now said parties, by attorneys, and after arguments herein, submit this cause to the Court.

And afterwards, to-wit, on the 16th day of December, 1908, the further following proceedings were had in said cause, viz:

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Appeal from Jackson County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Circuit Court rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. (Opinions filed.)

Which said opinions are in words and figures as follows, to-wit:

147 In the Supreme Court of Missouri in Banc, October Term, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

This cause originated in the circuit court of Jackson county, December 2, 1903, in which the plaintiff, a corporation organized under the laws of the State of Missouri, sought to recover of defendant, a corporation organized under the laws of Illinois, and having its chief office and place of business at Peoria in said State, $1,453.58 for lumber sold and delivered by the plaintiff to the defendant, an itemized account of which was annexed to and filed with the petition. On December 24th, 1903, a motion was filed by the defendant to stay the proceedings on the ground that there was pending against the defendant in the district court of Illinois a petition in involuntary bankruptcy. On January 11th, 1904, motion to stay the proceedings was sustained. On March 30th, 1904, the plaintiff filed its motion to set aside the stay of proceedings, which motion was sustained on May 14th, 1904. On October 12th, 1904, defendant filed an answer in the nature of a plea to the jurisdiction and a plea to the merits in the following words: "Now on this day comes the Acme Harvester Company and appearing especially for the purpose of this plea only pleads to the jurisdiction of this court and says this cause should not be prosecuted. Defendant further avers that heretofore in the district court of the United States for the Northern District of Illinois, Southern Division, a court of competent jurisdiction in that behalf, the petition was filed to adjudicate the Acme Harvester Company a bankrupt. Thereafter it was by said court ordered and adjudged that Beekman Lumber Company be enjoined until the further order of that court from maintaining this proceeding or prosecuting this action. The proceedings resulting in such injunction were duly had and the order and judgment of injunction were rendered. The defendant by way of protestation and
148 for answer to the petition of the plaintiff denies generally each and every allegation therein contained." On June 20th, 1905, plaintiff filed a reply in words as follows: "Plaintiff for reply to the answer of the defendant denies each and every allegation of new matter therein made or contained. For further reply plaintiff shows to the court that the matters set forth in defendant's answer were set forth in defendant's motion to stay proceedings herein filed December 24, 1903, which motion was by this court sustained; that afterwards on the — day of ——, 1904, this plaintiff filed its motion to set aside said stay order on the ground named therein that said matters did not entitle defendant to a stay; that said motion was sustained and no appeal was taken therefrom and thereby the matters and things set forth in defendant's answer were adjudged against

it and became res adjudicata and the defendant cannot now be heard to urge the same, wherefore plaintiff prays judgment as in his petition." The case was tried at the April term, 1905, and at the close of the evidence the trial court directed the jury to return a verdict in favor of the plaintiff and thereupon in accordance with the directions of the court, the jury did return a verdict in favor of the plaintiff and assess the damages at the sum of $1,587.52, and judgment was rendered accordingly in favor of the plaintiff against the defendant and the court further found that the defendant not having denied the grounds of attachment, the same stood confessed as true and plaintiff's attachment was sustained and the garnishee Union Avenue Bank of Commerce having admitted in its answer the possession of $1,342.45, the money of the defendant, it was further considered and adjudged by the court that plaintiff have and recover of and from said garnishee the said sum so confessed and have execution therefor and that the garnishee be allowed $25.00 as attorney fees and that defendant be given credit on the judgment for whatever sum the plaintiff may collect from the garnishee. In due time the defendant filed its motion for new trial and in arrest
149 of judgment, which was heard and overruled by the court and defendant excepted, thereupon the appeal was granted to this court in due form on July 15th, 1905, and leave was given the defendant to file a bill of exceptions, which was by the court allowed, signed and sealed and made part of the record. On the trial the plaintiff offered in evidence proof of the delivery of the goods sued for and a letter from the defendant giving a detailed statement of the lumber shipped by plaintiff, and the balance due plaintiff from the defendant, showing the sum to be $1,453.58, and rested.

On the part of the defendant the evidence was as follows: A petition in bankruptcy filed against the defendant in the District Court of the United States for the Northern District of Illinois Southern Division on the 23rd of November, 1903, in behalf of certain creditors in which it was charged that the Acme Harvester Company was insolvent and had committed certain acts of bankruptcy, to-wit: in giving illegal preferences to certain other creditors. Second, a petition for an injunction against the plaintiff Beekman Lumber Company from prosecuting this present action, which said petition for injunction was filed October 3, 1904. Third. An order granting the injunction until the further order of the said district court. In rebuttal the plaintiff offered and read in evidence a letter from the defendant by its vice president H. L. Stone, calling the plaintiff's attention to the fact that it had not yet signed "the creditors' committee" agreement whereby the affairs of the Acme Harvester Company would be placed in the hands of five of heaviest creditors, for the purpose of working up its assets and gradually liquidating its indebtedness and calling attention to the fact that Judge Kohlsaat has stopped the bringing of the suits against the company or endeavoring to throw it into bankruptcy, he having decided that it was solvent, and that the only reasonable and fair way to handle the business was through a creditors' committee selected by the heaviest

creditors, also a letter from Messrs. Newman, Northrup,
150 Levinson and Becker to the plaintiff calling their attention to this creditors' agreement and the steps to be taken for the liquidation of the Acme indebtedness. Also a letter from the creditors' committee to the plaintiff as follows:

"GENTLEMEN: In our letter of October 24th, we advised you a certain law firm of this city had caused a petition in bankruptcy to be filed against the Acme Harvester Company and made an application for an immediate appointment of a receiver. We are pleased that the motion for a receiver was heard this morning by the Honorable C. C. Kohlsaat, Federal Judge in Chicago, who refused to appoint a receiver, and said: 'This estate is a very large one and is in the hands of a committee of reliable creditors. It is my judgment that the creditors ought to manage and control the estate, the creditors can produce results much better than any receiver in handling a large manufacturing concern like the Acme Harvester Company.' At the close of the argument the court referred the matter to Judge David McCulloch, referee in bankruptcy at Peoria to inquire into the truth of the allegations of the petition and to ascertain whether the petitioning creditors have any standing or right to file a petition in bankruptcy. There is really only one creditor left in the bankruptcy proceedings although persistent efforts have been made by the lawyers to get other creditors to join.

Signed by D. L. Forgan, and others, Creditors' Committee."

Plaintiff also offered in evidence another letter from this creditors' committee calling attention to the proposed reorganization of the company and stating that they had received letters from about two-thirds of the creditors, eighty per cent of whom desired stock and the rest preferred to accept fifty per cent in cash and asking plaintiff to determine whether they would take stock or cash. Plaintiff also offered in evidence a report of the defendant to the United States
District Court of the business of the concern, a statement of
151 its assets and liabilities and the conduct of the business since January 1st, 1905.

1. The first proposition for consideration is whether this court has jurisdiction of this appeal, as the amount of the judgment appealed from is only $1,597.52. We think it is apparent that if this court has jurisdiction at all of this appeal, it must be found in section 12 of article 6 of the Constitution of this State, which gives this court jurisdiction in cases, "where the validity of a treaty, or a statute of, or authority exercised under the United States is drawn in question." The validity of a treaty or a statute of the United States is nowhere challenged in this record so that the question is narrowed down to the proposition whether "authority exercised under the United States" is drawn in question. As to what is drawing in question the validity of the authority exercised under the United States has often been the subject of judicial interpretation. The author of this provision of section 12 of article 6 of our Constitution, obviously had in mind the acts regulating appeals to the Supreme Court of the United States from the Supreme Courts of the several States and the

District of Columbia, and the Supreme Courts of the Territories. Sect. 709, R. S. U. S. 1878, 23 U. S. Statutes at Large, 443. By these acts an appeal or writ of error is allowed from any judgment at law or decree in equity in the Supreme Courts of the several States, the Supreme Court of District of Columbia, or the Supreme Court of any of the Territories, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty, or a statute of, or authority exercised under the United States, when the decision is against such right. The clause of our Constitution just cited is so nearly in the words of the Federal Statutes, and being on the kindred subject of appeals, we think it was clearly the object and purpose of the framers of the Constitution to confer jurisdiction on this court by appeal in those cases wherein the
152 validity of an authority exercised under the United States is involved within the meaning of the said Acts of Congress. An examination of the various decisions of the Federal Supreme Court will demonstrate that the question is one requiring the nicest discrimination.

In Dupassour vs. Rochereau, 21 Wallace, 130, the question for decision was whether a State court had given due effect to the decree of a court of the United States, and it was asserted that the record had presented no Federal question. The Supreme Court of the United States said "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867 may be brought to this court for revision.

The case would be one in which a title or right is claimed under the authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution, and it is clearly within the charts of appellate power given to this court over cases arising in and decided by the State courts." In Factors' and Traders' Insurance Company vs. Murphy, 111 U. S. 738, a court of the United States sitting in bankruptcy ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a State court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The State court decreed in favor of plaintiff, and a writ of error was prosecuted to the Supreme Court. In reversing the judgment of the State court it was said: "Counsel for
153 defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from encumbrances. Both parties assert

rights under this order of sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the (State) court the writ of error lies." In Avery vs. Pepper, 179 U. S. 305, the two cases last above referred to were approvingly cited, and the rule was declared to be that where a controversy in the State court presented a contention as to the validity or proper construction of an order or decree rendered by the court of the United States, a Federal question was presented reviewable by the Supreme Court of the United States." In Missouri, Kansas and Texas Railway Co. vs. Smith, et al., 154 Mo. 300, it was ruled by this court on an application for a writ of prohibition against the Kansas City Court of Appeals to prevent that court from further proceeding in the case of Elliott vs. said Railroad Company, which had been appealed to that court from the Cooper circuit court and to further prohibit said court from carrying out the judgment entered in said cause, and to transfer the record and proceedings in the said cause to this court, on the ground that a Federal question was involved, that a suit in a State court on a bond given in an injunction suit in a Federal Court for attorney's fees, whether the said fees were paid for having the injunction dissolved or the injunction was only ancillary to the main object of an action at law, pending in said Federal Court, did not involve a Federal question in such a way as to give this
154 court jurisdiction of the appeal although attorneys' fees are not considered by Federal courts elements of damages in suits on injunction bonds and the State court had held that attorneys' fees were recoverable in the suit on said board. Thereupon a writ of error was sued out from the Supreme Court of the United States to the Kansas City Court of Appeals and the Supreme Court of the United States in 184 U. S. 530, reversed the judgment of the Kansas City Court of Appeals and held upon the authority of Tullock vs. Mulvane, 184 U. S. 497, that the claim of immunity from liability for attorneys' fees as one of the elements of damage under the injunction bond, presented a Federal question, which was incorrectly decided by the Kansas City Court of Appeals in holding that it was proper to award the amount of such fees in enforcing the bond. Tullock vs. Mulvane and M. K. & T. Ry. Co. vs. Elliott, supra, cannot be reconciled with the decision of this court in M. K. & T. Ry. Co. vs. Smith et al., 154 Mo. 300. While those cases did not in terms overrule M. K. & T. Ry. Co. vs. Smith et al., they did overrule the Kansas City Court of Appeals, and the Supreme Court of the United States took jurisdiction of the appeal on the ground that the validity of an authority exercised under the United States was directly involved, which this court had denied in the case for prohibition. Those cases sufficiently indicate the course of decision in the Supreme Court of the United States and as that court is the final authority

as to what constitutes a Federal question, its decision must control. Now in the instant case, the question is presented what is the effect of the proceedings in bankruptcy filed in the District Court of the United States as against this action thereafter instituted in a court of Missouri. From the statement of the case, it will be observed that the circuit court held that said proceedings in bankruptcy were no bar to a recovery by the plaintiff of its claims against the defendant, and the main insistence on this appeal is that the filing of the petition in bankruptcy was a caveat to all the world and thereafter all
155 the property rights of the defendant passed under the jurisdiction of the bankrupt court and operated as an injunction against all other creditors and persons, to not thereafter interfere with the estate, and that the circuit court erred in not so holding and in giving judgment for the plaintiff.

That the United States District Court had jurisdiction to adjudicate the defendant a bankrupt is not questioned. That a petition to have it adjudged a bankrupt October 22, 1903, was filed, appears from the record. Afterwards this suit was brought in Jackson county against the defendant. On October 3rd, 1904, the United States District Court for the Northern District of Illinois, Southern Division, ordered that the Beekman Lumber Company of Kansas City, Missouri, be restrained and enjoined until the further order of said court from the further prosecution of this action in the circuit court of Jackson county. The defendant in the suit pleaded that injunctive order in abatement of this action and the circuit court decided against such plea. Whether rightfully or wrongfully the United States District Court exercised the authority of granting the injunction and it did so as a court of the United States, and the State court, it is charged, denied the validity of that injunction. In our opinion, this presents a case for the appellate jurisdiction of this court under section 12 of article 6 of the Constitution of this State.

2. We are thus brought to the important question in this case and that is the effect of the proceedings in bankruptcy filed in the United States District Court for the Northern District of Illinois, as against this action thereafter brought in the circuit court of Jackson county. The question is divisible. First, what was the effect of the filing of the petition? On the part of the defendant it is insisted that the filing of the petition alone was a caveat to all the world and in effect an attachment and injunction. "Thereafter all the property rights of the debtor were ipso facto in abeyance until the
156 final adjudication." Loveland in his work on Bankruptcy, page 15, speaking of the differences between the Bankrupt Acts of 1867 and 1898, says: "Fifth. Another important difference between the two acts is the time when property passes out of the bankrupt. Under the Act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of the law under the Act of 1898 *as of the date of the adjudication in bankruptcy.*" In Muller vs. Nugent, 184 U. S. 1-14, C. J. Fuller said: "It is as true of the present law as it was of that of

1867, that the filing of the petition is a caveat to all the world and in effect an attachment and injunction * * * and on adjudication, title to the bankrupt's property became vested in the trustee (section 70, 21 c. Act of July 1st, 1898, c. 541. 30 Stats. at Large, 565-552 (U. S. Comp. St. 1901, p. 3451, 3430) with actual or constructive possession and placed in the custody of the bankruptcy court." "The adjudication operates as a seizure of the property of the bankrupt by which it is taken in custodia legis." In re Granite City Bank, 137 Fed. Rep. 821. One fact stands out prominently in this record and that is that this plea of want of jurisdiction on the part of the circuit court of Jackson county to render judgment against the Acme Harvester Company is not made by a trustee in bankruptcy of said Harvester Company appointed by the United States District Court or by a receiver appointed by said court to take charge of the property of the said Harvester Company, but is made by the defendant, the Acme Harvester Company, itself. It is significant that this action was begun on December 7th, 1903, and the petition for bankruptcy was filed October 23rd, 1903, and the trial of this cause was had on the 20th of June, 1905, and yet no adjudication had ever been made up to the rendition of the judgment in this case that the said Harvester Company was a bankrupt, and learned counsel for defendant in this court solemnly admits in open court that even up to the time of the argument of this cause
157 on appeal in this court, *no adjudication* of bankruptcy had been made by the United States District Court for the Southern Division of the Northern District of Illinois. Thus it appears that while a petition in bankruptcy was filed in the bankrupt court on November 23, 1903, against defendant, no adjudication had taken place up to October, 1908. Plaintiff asserts and the record sustains its contention that on October 26th, 1903, an adjudication of bankruptcy was denied. The only answer of defendant to this is that there was no *formal refusal of adjudication*. It must, however, be borne in mind that the circuit court of Jackson county is a court of general jurisdiction and has jurisdiction in attachment cases of this kind and amount and the *res* was within its territorial jurisdiction and had been seized by its sheriff and it devolved upon defendant to show that said court had no jurisdiction because another court of exclusive jurisdiction had first obtained jurisdiction over the moneys held by the garnishee on deposit for defendant. That property in the legal custody of a court of competent jurisdiction is not subject to seizure by judicial process from another court, is the settled law of this court, and the court in which jurisdiction first attaches must prevail. Bates Co. Nat'l Bank vs. Owen, 79 Mo. l. c. 431; Metzner vs. Graham, 57 Mo. 404; Freeman vs. Howe, 24 How. (U. S.) 450; Buck vs. Colbath, 3 Wall. (U. S.) 334. Conceding then that had an adjudication in bankruptcy followed the filing of the petition for bankruptcy on October 23rd, 1903, *such adjudication*, in the language of the Supreme Court of the United States, would have "operated as a seizure of the property of the bankrupt by which it was taken in *custodia legis*," and the District Court of the United States in Illinois, would have had exclusive jurisdiction

over the estate of the defendant wherever found, yet when the record discloses that Judge Kohlsaat, the Judge of the United States Court, refused to appoint a receiver and that two years had elapsed before the trial of this cause in the circuit court of Jackson county
158 and no adjudication had yet taken place, we think but one rational conclusion can be drawn and that is that the United States District Court *did refuse an adjudication* in bankruptcy and that the steps taken to obtain an adjudication in Bankruptcy were *abandoned*, and this is buttressed by the testimony showing that with the knowledge and approval of that court a creditors' committee took charge of the affairs of defendant and were administering them, collecting debts due and paying debts owing by defendant. This condition of affairs is utterly irreconcilable with any claim that said District Court has asserted and is asserting jurisdiction as a bankrupt court over the estate of defendant and has such a custody of said estate as would preclude a creditor from asserting his or its claim against defendant in another court of competent jurisdiction. Certainly an *adjudication* now could not restore that equality which the Bankrupt Act contemplates. The statement of this creditors' committee discloses sales of real estate of defendant, the purchase of new raw material with the moneys of defendant; the payment of wages of employees for the year 1904, to the amount of $197,000; the disbursement of funds of defendant to the amount of $927,217.84, and provision made for the sale of the output for 1905. In a word, the business of defendant is being conducted by a committee of creditors by and with defendant's consent and the knowledge and acquiescence of the District Court and the disposition and dissipation of the funds and property of defendant owned by it when the attempt to have it adjudicated a bankrupt was commenced. Upon what principle of law and regard for the Bankrupt Act of 1898, can the said District Court now adjudicate bankruptcy and oust all other courts of their rightful jurisdiction against defendant? In our opinion all these considerations are wholly inconsistent with such a claim and show, we think, that all idea of such an adjudication has been abandoned and therefore that the insistence that the mere filing of the petition in bankruptcy without any subsequent adju-
159 dication of bankruptcy did *ipso facto* place defendant's property in *custodia legis* of the District Court is not tenable, and the subsequent action of that court convinces us that it in fact refused an adjudication and that the circuit court of Jackson county was not deprived of its jurisdiction by attachment on that ground, and it properly so held.

3. But notwithstanding, the mere filing of a petition which is not followed by an adjudication, cannot have the effect of placing the debtor's property in *custodia legis*, there remains the still further contention of defendant that the circuit court of Jackson county was bound to suspend and stay the proceedings in this case because the United States District Court granted an injunction against the plaintiff herein, specifically, by name, enjoining it from further prosecuting this suit, which resulted in the judgment from which this appeal was taken. Said injunction was granted

October 2nd, 1904, on the petition of the *defendant herein*, without notice, or the service of a subpœna on plaintiff from the United States District Court. It was ruled in several cases under the Act of 1867, that injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under section 40 of the Act may be allowed and issued without notice; that the provision in the judiciary act of 1793 (1 U. S. Stat. at Large, 334) forbidding the writ to be granted in a suit in equity, without notice to the adverse party, does not apply to proceedings in the district court under the bankrupt act. Ex parte Smith, 12994 Fed. Cases. Ex parte Carlton, 2415 Fed. Cases. In re Wallace, 17094 Fed. Cases. In re Muller, 9912 Fed. Cases. An examination of these cases, however, will show that the injunctions issued against parties within the territorial jurisdiction of the District Court of Bankruptcy, whereas in this case neither the party enjoined or the attached property was in the Southern District of Illinois. Section 2 of the Bankrupt Act of 1898, like its predecessor in the Bankrupt Act of 1867, provides that the District Courts of the United States in the several states * * *

160 are hereby made courts of Bankruptcy and are hereby invested *within their respective territorial* limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms. By section 11 of the Act of 1898, it is further provided that: "A suit which is founded upon a claim from which a discharge would be a release and which is pending against him shall be stayed until after an adjudication or the dismissal of the petition," and sub-section 15 of section 2 of the Act, provides that the District Court "May make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

It will be observed that the ground upon which defendant seeks to have the judgment of the circuit court of Jackson county reversed is that the United States District Court of the Northern District of Illinois had issued an injunction enjoining and restraining the plaintiff from the further prosecution of its suit in the State court, under and by virtue of its equity jurisdiction to stay proceedings in other courts. All courts of the United States are forbidden to stay proceedings in any court of a State, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy. U. S. R. S. sect. 720. Haines vs. Carpenter, 91 U. S. 254.

Broad and sweeping as the provisions of the Bankrupt Act are in conferring jurisdiction to grant injunctions to stay suits in other courts both State and Federal, in order to preserve the estate of the bankrupt and distribute it *pari passu*, between and among his creditors, it is confined by the terms of the Act itself to the territorial limits of the jurisdiction of the District Court. The effect of this limiting the jurisdiction of the bankrupt courts to their territorial

limits has received much consideration by the Federal courts.

161 In re Waukesha Water Company, 8 Amer. Bankruptcy Reports, 715, was a proceeding in the United — District Court for the Eastern District of Wisconsin for a rule upon the Waukesha Hygeia Ice Company and Palmer to show cause why certain instruments in the possession of the latter, including one purporting to convey to the Ice Company certain property of the bankrupt, held by the trustee in bankruptcy, should not be surrendered for cancellation. Both parties named as respondents were residents of Illinois, without the territorial limits of this District Court, and were there served with an order to show cause, and both entered a special appearance, with a plea to the jurisdiction over the subject matter and in personam. Jurisdiction of the subject matter was sustained upon the authority of Mueller vs. Nugent, 184 U. S. 1, but said the court: "The questions raised, however, of jurisdiction to act in personam upon these respondents, who reside in another State and district and are there served with the order to show cause in this matter, is not met by that decision, nor is such service authorized by any express provision of the Bankruptcy Act or ruling thereunder called to my attention. In the absence of statutory authority for the process of the court to run beyond the territorial limits of the District, the doctrine is well settled that no jurisdiction exists to that end. As stated in the early and leading case of Toland vs. Sprague, 12 Peters, 300, 328: "Whatever may be the extent of the jurisdiction over the subject matter of the suit, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state in the Union. It has not done so," except in the case of subpœna for witnesses." It was thereupon held that service of its process cannot be made without the district. See also Ex parte Graham, 3 Wash. C. C. 456. Fed. Cases No. 5657 and cases noted; Picquet vs. Swan, 5 Mason, 35. Fed. Cases No. 11,134; 1 Foster's Fed. Prac. (3 Ed.) sec. 96; 1 Desty Fed. Proc. (9 Ed.) p. 412.

162 An important exception to this rule was upheld by Mr. Justice Story in Dunlap vs. Stetson, 4 Mason, 349, Fed. Cases 4,164, in the case of a bill filed to enjoin the enforcement of a judgment at law in favor of a nonresident plaintiff, *entered in the same court*, and jurisdiction was sustained under a service without the district upon the ground that the suit was "auxiliary and dependent," not original and of necessity must be so cognizable by the court which rendered the judgment. In Jones vs. Andrews, 10 Wall. 327, and Webb vs. Barnwall, 116 U. S. 193, the general doctrine of Dunlap vs. Stetson was approved, but the question of service beyond the limits of the District was not raised in either of the last mentioned cases as to call for decision. By subsequent statute however such service is authorized in certain equitable actions in the circuit court, relating to property within the district, including one to remove a cloud upon title. 1 Supp. R. S. (2 Ed.) Ch. 137, sec. 8; 1 Desty Fed. Proc. (9 Ed.) sec. 25; but its provisions are applied in terms to such suits only "commenced in any *circuit court* of the United

States" and are not applicable to this proceeding in the District Court, unless adopted by some provision of the Bankrupt Act. The further provision requiring actions to be brought in the district where the defendant resides (1 Supp. R. S. (2 Ed.) Ch. 866 Sect. 1) is applicable only to original suits and not to the present proceeding, within the distinction approved by the authorities cited.

Is authority conferred by implication in the terms of the Bankrupt Act to thus summon parties who are without the limits of the district?" The conclusion was that there was no authority for the order and service in question and that the objection for want of jurisdiction over respondents was sustained.

In Paine vs. Caldwell, 1 Haskell, 452, the assignee of a bankrupt brought a bill in the United States District Court for the State of Maine to recover from a citizen of Massachusetts the amount of a judgment recovered by him in the courts of Maine against
163 his debtor, the bankrupt and collected in fraud of the Bankrupt Act through an attorney in Maine upon whom process was served. The respondent appeared and pleaded that the district court had no jurisdiction over him, inasmuch as he was a citizen of Massachusetts and had no property within the jurisdiction of the district court.

After a most exhaustive review of the Federal Statutes and the opinions of the Supreme Court of the United States and circuit courts thereof, the conclusion was reached that the district court had no jurisdiction to send its process into another district and bring a citizen of Massachusetts before it, but was limited to its territorial limits. In Jobbins Assignee vs. Montague et al., 5 Benedict, 422, it was ruled that a subpœna to appear and answer in a suit in equity brought by an assignee in bankruptcy to restrain the foreclosure of a mortgage is original process in a civil suit within 11th section of the Judiciary Act of 1789, and no authority is to be found in the Bankruptcy Act for the service of such a subpœna on a defendant in the cause, outside of the limits of the district within which such suit is brought.

Judge, afterwards Mr. Justice Blatchford of the Supreme Court of the United States, delivered the opinion. Jurisdiction of the subject matter of the bankrupt's estate and of all suits in equity brought by the assignee was conceded, but the question was whether the District Court of the Southern District of New York could and did obtain jurisdiction over Montague, the mortgagee, by the service of a subpœna issued out of chancery, from the said district court. In principle that case was on all fours with the one at bar save and except that the injunction granted in this case was wholly without process of any kind or attempt thereat. That was the foreclosure of a mortgage on New Jersey lands; this is an attachment against Missouri personalty. In each case the court in which the injunction was sought was the United States District of another State and District, and in neither case did the respondent enter a voluntary appearance.

164 In the Jobbins case, a subpœna out of chancery was issued and served in New Jersey and as already said, the question

of jurisdiction over the person of the plaintiff mortgagee in the New Jersey State court, by virtue of the service of the subpœna was the matter for decision. Judge Blatchford said: "So far as Montague (the mortgagee) is concerned, the bill prays for an account of the amount due on the bond and mortgage to him and for a decree that the plaintiff is entitled to redeem the mortgaged premises on paying to Montague the amount so to be found due and that Montague shall then deliver up the mortgage to be cancelled and *that all suits* and proceedings by Montague, now or hereafter, *to foreclose the mortgage,* or to sell or obtain possession of the mortgaged property, *may be enjoined.* This is not a cross bill in any sense. Montague has no suit pending in this court. It is an original bill praying for original relief and the subpœna, issued on it, is original process. That this court (the United States District Court for New York) independently of any provision in the Bankruptcy Act, could not acquire jurisdiction of the person of Montague in this suit, but such service of the subpœna as has been made in this case, is not doubtful. Independently of that Act, *this court could make effective no service beyond the limits of this district,* of process of subpœna, in equity, to appear and answer, issued by it (Toland vs. Sprague, 12 Peters, 300, 330; Herndon vs. Ridgway, 17 How. (U. S.) 424, 425; Atkins vs. The Fibre Disintegrating Company, 7 Blach. C. C. R. 566).

Does then the Bankruptcy Act make lawful such service of the subpœna to appear and answer as was made in this case? The learned Judge then quotes from Toland vs. Sprague, 12 Peters, 330, wherein the Supreme Court says: "Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district." And adds: "These views being founded on the language of the 11 section of the Act of 1789, are equally applicable to
165 the service of original process issued by a District Court."

There is nothing in the second section of the Bankruptcy Act dispensing with or repealing the provisions of the said 11th section and nothing repugnant to or inconsistent with them." It was held that the service of the subpœna must be set aside and also the injunction.

That the distinction has been maintained between the power of the District Court in Bankruptcy in issuing injunctions to restrain proceedings in State courts within the territorial limits of its own district and its power to enjoin such proceedings outside of its territorial jurisdiction, is clear we think from an examination of the Federal authorties. In re Litchfield, 13 Fed. Rep. 863. Judge Brown, afterwards Mr. Justice Brown of the Supreme Court of the United States, had before him, in the Eastern District of Michigan, a petition for an injunction and for an attachment for contempt against one Nestor for unlawfully interfering with the property of one Litchfield, a bankrupt, in the State of Michigan. Litchfield had been adjudged a bankrupt by the District Court of the Southern District of New York, and the petitioner, a resident of New York, had been appointed his assignee in bankruptcy. Among the assets were about 4600 acres of pine land in Michigan. In 1881, these

lands were damaged to such an extent by fire that it was deemed necessary by the assignee that the timber should at once be cut and lumbered and thereupon the District Court of New York made an order to lumber the same, and contracts were made with Brown and Davidson for cutting and manufacturing the same into lumber.

In 1882, the heirs of one Stewart, with one exception, conveyed their interest in these lands to Nestor, who thereafter claimed to be the owner of two-thirds of the title to said lands. Nestor replevied a portion of the lumber from one Fisher, who had bought the same from the assignee; and also brought ejectments in the State courts against Brown and Davidson and had notified the boom company, which was in possession of some of the logs cut from said
166 lands to deliver them to him, the said Nestor. Nestor claimed that a deed from one Knight as receiver to the bankrupt was void for several reasons and denied the authority of the District Court of the United States for the Southern District of New York to authorize the assignee to lumber said timber or continue the business of the said bankrupt beyond nine months after he was adjudged bankrupt or to enter upon or do any acts upon the lands in Michigan. As to these last two propositions the court found it unnecessary to express an opinion but said that an assignee in bankruptcy after giving bond and qualifying might take immediate possession of the property of the bankrupt in his district and might take peaceable possession of the bankrupt's property in whatever State or district he might find it, without application to the bankruptcy court of such other district as might enjoin proceedings in the State courts, as held in Ex parte Schwab, 98 U. S. 240. Said Judge Brown: "Thus far we have discussed the powers and immunities of an assignee within his own district. Other considerations present themselves when the authority of the assignee is sought to be enforced in other districts. I see no reason to question his authority to take peaceable possession of the property of the bankrupt in whatever State or district he may find it, without application to the bankruptcy court of that district. But third persons whose rights he may chance to assail, are entitled to protection. The power to punish those interfering with property in the possession of an assignee or to enjoin the prosecution of suits in the State courts presupposes that the adverse claimant may go into bankruptcy court and have his right adjusted. But suppose the assignee, as in this case, sends his agent into another State to take possession of lands and lumber them, the adverse claimant cannot resort to the district court of this district for the assertion of his rights since there is no case pending here and no assignee within the district upon whom process can be served. Must he go to the Southern District of New York, or possibly
167 to the District of Oregon to substantiate his claim? Certainly not. A requirement of this kind would be an intolerable hardship. As the process of a bankruptcy court cannot reach into other districts, (Jobbings vs. Montague, 6 Nat. Bankruptcy, R. 558) neither can inhabitants of other districts be compelled to resort to courts outside of their own jurisdiction. Their only recourse then is to State courts in which suit may be begun against the persons in

actual possession of the property whether they be agents of the assignee or not. I am therefore clearly of the opinion that Nestor was not guilty of contempt in bringing the actions of ejectment, nor in giving notice to the boom company, although such notice would undoubtedly have been a contempt if the transaction had occurred *within* the district where the bankruptcy proceedings were launched." Now bearing in mind that the contention of the defendant here is that the circuit court of Jackson county had no right or jurisdiction to take further cognizance of plaintiff's action of attachment for that it had been enjoined by the United States District Court, for the Southern Division of the Northern District of Illinois, in bankruptcy, from the further prosecution of its said action in attachment and that said injunction was granted without notice and that no subpœna had issued to plaintiff, and under the authorities already cited could not have issued to plaintiff or if issued would have been without authority of law, what effect had said injunction on the plaintiff or the circuit court of Jackson county? The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. This jurisdiction was not accomplished however, without a long and severe opposition from the common law judges which continued until the reign of James the First. 1 Lord Campbell's Lives of the Chancellors, 235. 1 Spence's Eq. Jur. 675; 4 Pomeroy's Eq. Jur. sec. 1360. In the last cited treatise it is said: "The injunction is not addressed to nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes their jurisdiction. 168 It is addressed to the litigant parties and prohibits them from resorting to the legal jurisdiction because their controversies, depending upon equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates *in personam*." This is the recognized doctrine of all courts.

If then as we have seen the Bankrupt Court of the Northern District of Illinois was confined by the Act of Congress to the territorial limits of said district, in issuing process, as has been repeatedly held by the Federal Courts, and could not reach plaintiff, a citizen of Missouri and a resident of the Western District of this State and said court had and has no power to punish plaintiff for a contempt of said injunction, it seems obvious that said bankrupt court acquired no jurisdiction over the person of the plaintiff herein and as to it, was of no binding or controlling effect and presented no obstacle to the further prosecution of its attachment suit. Moreover all the authorities cited which deny the power of the district courts in bankruptcy to reach parties outside of their respective districts, were causes wherein there had been an adjudication in bankruptcy and an assignee had been appointed and qualified and if such was the ruling in these cases, how much stronger is the case of plaintiff in this case, wherein no adjudication of bankruptcy of the defendant herein has taken place five years after the initial steps were taken to have it adjudged a bankrupt and wherein no trustee, receiver or marshal of the District Court has been ordered to take charge of de-

fendant's property, and wherein it appears, that by and with the consent of said District Court the affairs and property of defendant continues to be carried on for its benefit by a selected body of its creditors. Under these circumstances how can it be said that the circuit court of Jackson county was transcending the proper limits of jurisdiction in rendering judgment for plaintiff and refusing to accord to the Federal Court proper respect?

169 The contention however, is that although the District Court of Illinois did not and has not after five years adjudicated defendant a bankrupt and has not appointed an assignee, receiver or trustee to take charge of its property nor directed its marshal to do so, but has with its consent permitted a committee of defendant's creditors to proceed to collect its debts, employ operatives and disburse its funds, yet the application to have defendant adjudged a bankrupt is still pending in that court and therefore no other court can interfere with its power over the attached indebtedness in this case. We have already said that in our opinion the facts disclosed in this record indicate to us that said application for an adjudication in bankruptcy has been abandoned and for that reason there is no conflict of jurisdiction. But more than that it is not true, in our opinion, that the District Court in Bankruptcy can summarily affect the rights of parties outside of said district, where its process cannot run and deprive them of their rights to go into the State Courts to assert their rights and when they have done so, by ex parte injunctions, restrain them from proceeding with their actions in other districts. The conditions are anomalous. This court fully recognizes the exclusive power of Congress to enact bankrupt laws and enforce them, but we find nothing in the Bankrupt Act of Congress of 1898, or the amendment of 1903, which gives countenance to the contention of defendant in this case, which seems to us more than a cloak to shield it from the rightful actions of its creditors by permitting the conducting of its business, not by an assignee in bankruptcy, nor by a receiver, marshal or trustee of the bankrupt but by certain of its creditors according to their notions. Surely it was not the purpose of Congress to permit a petition for involuntary bankruptcy to lie dormant in the District Court of the domicile of the debtor for five years, and in the meantime permit the alleged bankrupt or certain of his creditors to go ahead, collecting and disbursing his assets and liquidating

170 certain of his debts, and then months afterwards when another creditor brings his action in another district in a court of competent jurisdiction, on the application of the alleged insolvent, allow such creditor to be enjoined by the District Court in Bankruptcy, without notice and without service of a subpœna, from pursuing his action in the State court. In our opinion, the injunction granted by the District Court of the Northern District of Illinois, after its refusal and failure to adjudge defendant a bankrupt and against the plaintiff, who was and is a resident of the Western District of Missouri without notice or the service of a subpœna, was without authority of law and void for want of jurisdiction over the plaintiff and that the circuit court of Jackson county was not interfering

with the jurisdiction of the United States District Court in Bankruptcy, but simply asserting its own rightful jurisdiction and the said injunction constituted no lawful obstacle to the judgment of the circuit court of Jackson county.

4. It is urged, however, that error was committed because the circuit court directed the jury to return a verdict for the amount of said account and interest thereon at the rate of six per cent per annum from the date of the commencement of this action. Inasmuch as the action was based upon the defendant's own written statement of the items of the account sued on and the balance therein admitted to be due and there was no testimony on the part of the defendant tending in any manner whatever to impeach the items of said account or the amount due thereon, there would seem to have been nothing to submit to the jury unless the contention of defendant, that the court should have left it to the jury to calculate the interest and should not have computed the interest itself, due plaintiff, from the date of the commencement of this action to the day of the trial, at six per cent per annum, is sound. By section 3075, R. S. 1899, "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon,
171 for all moneys, after they become due and payable on written contracts, and on accounts after they become due and demand of payment is made." It has often been ruled that the commencement of an action for money is sufficient demand. While interest is not given as a matter of course in actions for torts, surely it would not have been erroneous for the court to have directed the jury that plaintiff was entitled to interest on its account at the rate of six per cent from the date of the commencement of the suit and there is no claim that the interest actually allowed by the jury in obedience to the instruction of the court was not correctly calculated. We are forbidden by the statutes to reverse judgments for errors or irregularities unless they materially affect the merits of the action. Section 865, R. S. 1899. To reverse and remand this judgment for another trial simply to have a jury calculate the interest again on the amount acknowledged by the defendant in writing to be due plaintiff would be a clear violation of the statute.

The judgment is affirmed.

JAS. B. GANTT, *C. J.*

Burgess, Valliant & Fox, JJ. concur. Judge Woodson dissents in separate opinion in which Judges Lamm & Graves concur.

172 In the Supreme Court of Missouri, Court in Banc, October Term, 1908.

(No. 13180.)

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Dissenting Opinion.

While I concur in many things stated in the majority opinion written herein, yet I dissent from the conclusions reached by the majority of my brethren.

The Constitution of the United States and the statutes enacted in pursuance thereof confer original and exclusive jurisdiction upon the United States District Courts to hear and determine all bankrupcty proceedings.

The filing of the petition in bankruptcy in the District Court of the United States for the Northern District of Illinois against the Acme Harvester Company gave that court exclusive jurisdiction over all the property and effects of the company, and no other court, State or Federal, has any authority to interfere therewith. The filing of the petition was a caveat to all the world and constructively, at least, placed all of the company's assets *in custodia legis* wherever located in the United States; and it was not necessary, as the majority opinion seems to hold, for the District Court to have first adjudged the company a bankrupt before its jurisdiction could become complete and exclusive. The adjudication in bankruptcy fixes the status of the property and vests the title thereof in the trustee in bankruptcy for the use and benefit of the creditors, and is not one of the necessary steps to be taken in order to confer jurisdiction. The court must first acquire jurisdiction before it can adjudge
173 one a bankrupt, otherwise it would be taking his property without due process of law.

All the authorities hold that whenever the jurisdiction of a court of competent authority takes jurisdiction of a cause, that fact must of necessity exclude the jurisdiction of all other courts over the same cause, as well as all of the incidents thereto, excepting only such courts as are given appellate and supervising control over them. The reason for this rule seems to be that when such a court takes jurisdiction of a particular case with all the incidents thereto, there remains nothing of it to which the jurisdiction of another court could attach—no case, no parties, no subject-matter is left exposed to the authority of another court.

State ex rel. v. Reynolds, 209 Mo. l. c. 182.

II.

Concede for the sake of the argument only that the District Court of the United States for the Northern District of Illinois has been

tardy and negligent in adjudicating the Acme Harvester Company a bankrupt, yet that fact would not oust it of jurisdiction over the case. That misconduct, if misconduct it is, should be corrected in the Federal and not in the state courts. The former have ample competency to do whatever in that respect may be necessary.

"This principle is essential to the proper and orderly administration of the laws, and while its observation might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of processes. If interference may come from one side, it may be from the other also, and what is begun may be reciprocated indefinitely."

Maclean v. Wayne Circuit Judge, 52 Mich. l. c. 258-9.

State ex rel. v. Reynolds, supra, l. c. 184.

174 III.

Nor am I able to concur in the conclusion reached in the majority opinion to the effect that the United States District Court of Illinois has abandoned its jurisdiction over the bankruptcy proceedings instituted against the Acme Harvester Company.

Clearly, there is nothing contained in this record which would warrant this court in so holding. The letter written by D. L. Forgan to plaintiff is no evidence of an abandonment. It does not purport to have been written by authority of that court nor does it have any binding authority upon that court; and it would be a novel proceeding indeed for us to hold on the strength of that letter that the court had renounced jurisdiction over the case. By so holding we might invite the writing of many such letters, and thereby jeopardize the jurisdiction of this and other courts over many cases which have been pending and undisposed of for much longer periods than the one that case has been pending in that court.

Nor am I of the opinion that a lawyer of this bar possesses the authority, either by written or oral statements, to oust this or any other court of its jurisdiction over a cause pending therein.

The jurisdiction of courts does not rest upon such a precarious foundation but is bottomed upon the laws of the country, and they cannot be deprived of their jurisdiction except by their own orders or by the orders and judgments of those courts which have appellate or supervising control over them.

But upon the other hand, this record affirmatively shows that the District Court has not abandoned its jurisdiction over the proceedings, because it shows that on October 3rd, 1904, that court issued an injunction against respondent restraining and enjoining it from the further prosecution of this case until further ordered by that court. The issuance of that injunction is wholly at variance with the idea of abandonment of jurisdiction; and if it be conceded, as contended by counsel for respondent, (which I do not be-

175 lieve) that said District Court possessed no authority to issue an injunction against a non-resident of Illinois, still that fact would not alter the other fact that it still retained jurisdiction and was making orders therein, which is inconsistent with the con-

tention that said court had abandoned its jurisdiction over the cause.

In my judgment the District Court of the United States for the Northern District of Illinois still possesses jurisdiction over the bankruptcy proceedings mentioned, and that the Circuit Court of Jackson County was without jurisdiction and authority to try this cause.

I am, therefore, of the opinion that the judgment of the Circuit Court should be reversed and the cause dismissed.

Lamm & Graves, JJ., concur.

A. M. WOODSON, *Judge.*

176 And afterwards, to-wit, on the 16th day of January, 1909, the further following proceedings were had in said cause, viz:

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Now at this day, there is presented to the Honorable Leroy B. Valliant, Chief Justice of the Supreme Court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States; a citation directed to said plaintiff and respondent, citing and admonishing it to appear at the Supreme Court of the United States on the 15th day of February, 1909; an assignment of errors and a bond in the sum of Four Thousand Dollars; Which said writ of error is allowed, said citation signed and issued, said assignment of errors filed, and said bond approved, ordered filed and made a part of the record herein.

Which said assignment of errors is in words and figures as follows to-wit:

177 In the Supreme Court of Missouri, October Term, 1908.

No. 13180.

BEEKMAN LUMBER COMPANY, Respondent,
vs.
ACME HARVESTER COMPANY, Appellant.

Assignments of Error and Prayer for Reversal.

Now comes Acme Harvester Company, appellant and defendant herein, and for the purpose of becoming plaintiff in error in this cause from the Supreme Court of Missouri to the Supreme Court of the United States, assigns error in the judgment of said Supreme Court of Missouri, affirming the judgment of the Circuit Court of Jackson County, Missouri, entered herein, and says that in the record and proceedings in this cause, wherein the Supreme Court of Missouri has rendered its judgment as aforesaid, affirming the judgment of the circuit court of Jackson County, Missouri, entered

herein, there was manifest error to the prejudice of said Acme Harvester Company, in its rights under the laws and the constitution of the United States duly set up and claimed by it in said cause as will appear from the record therein, as follows:

I.

The Supreme Court of Missouri erred in affirming the judgment rendered by the circuit court of Jackson County, Missouri, in the above entitled cause for the reason that the trial court erred in proceeding to a judgment in this case, there being pending at the time of the institution of this action, a proceeding in bankruptcy against defendant herein. Such proceeding was pending in a court
178 of the United States and that court had enjoined the prosecution of this action. In so proceeding to judgment, and in ignoring such injunction, and in failing to give full faith and credit thereto, the trial court decided against the validity of a statute of and an authority exercised under the United States; and decided against a title, right, privilege and immunity claimed under the constitution and statutes of and authority exercised under the United States, which right, title, privilege and immunity was specially set up and claimed by the defendant herein, all in violation of section 8 of Article I of the constitution of the United States, which gives Congress the power to establish uniform laws on the subject of bankruptcies and in violation of Article VI of the constitution of the United States which provides that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and in violation and disregard of an Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and the amendments thereto, commonly known as the National Bankruptcy Law.

II.

In affirming the judgment of the Circuit Court of Jackson County, Missouri, rendered in the above entitled cause, the Supreme Court of Missouri decided against the validity of a statute of and an authority exercised under the United States, and decided against a title, right, privilege and immunity claimed under the constitution and statutes of and authority exercised under the United States, which right, title, privilege and immunity was specially set up and claimed by the defendant herein, all in violation of section 8 of Article I of the constitution of the United States, which gives Congress the power to establish uniform laws on the subject of
179 bankruptcies and in violation of Article VI of the constitution of the United States which provides that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and in violation and disregard of an Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and the amendments thereto, commonly known as the National Bankruptcy Law.

III.

The Supreme Court of Missouri erred in holding that notwithstanding the pendency of the proceedings in bankruptcy in the District Court of the United States for the Northern District of Illinois, Southern Division against Acme Harvester Company, and that notwithstanding the issuance of an order of injunction by that court, restraining and enjoining the prosecution of the action in the case at bar, nevertheless, the Beekman Lumber Company might proceed to a judgment against the defendant in the case at bar in the Circuit Court of Jackson County, Missouri, and might maintain and prosecute its action against the defendant herein and might subject to the payment of its debts against the defendant herein, assets of the defendant which had come within the custody of and subject to the control of the District Court of the United States for the Northern District of Illinois, Southern Division, all in violation of section 8 of Article I of the Constitution of the United States, which gives Congress the power to establish uniform laws on the subject of bankruptcies and in violation of Article VI of the constitution of the United States which provides that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land
180 and in violation and disregard of an Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and the amendments thereto, commonly known as the National Bankruptcy Law.

Defendant, appellant and plaintiff in error, Acme Harvester Company, presents the foregoing assignments of error, in order that it may appear of record in this cause that it is entitled to a reversal and an annulment of the said judgment of the Supreme Court of Missouri so rendered as aforesaid and to obtain right and justice in the premises, and to that end, that a writ of error to the Supreme Court of the United States may be granted to it and that the judgment of the Supreme Court of Missouri so rendered as aforesaid may be reversed and the record returned to that court with directions to proceed according to law.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
KARNES, NEW & KRAUTHOFF,
EDWIN A. KRAUTHOFF,
Attorneys for Acme Harvester Company, Defendant, Appellant and Plaintiff in Error.

181 Which said bond is in words and figures as follows, to-wit:

Know all men by these present: That we, Acme Harvester Company, a corporation as principal, and The Bankers Surety Co. a corporation, as surety, are held and firmly bound unto Beekman Lumber Company in the full and just sum of four thousand ($4000) dollars, to be paid to the said Beekman Lumber Company as aforesaid, to which payment well and truly to be made we bind ourselves, our heirs, successors, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 15th day of January, in the year of our Lord 1909.

Whereas lately at the October Term, 1908, of the Supreme Court of Missouri, in a suit depending in said court between the Beekman Lumber Company as plaintiff and respondent, against Acme Harvester Company, as defendant and appellant, judgment was rendered against said Acme Harvester Company, and the said Acme Harvester Company having obtained a writ of error of the state court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff and respondent citing and admonishing it to be and appear at the Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now therefore, the condition of the above obligation is such that if the said Acme Harvester Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea then the above obligation to be void else to remain in full force and virtue. And the approval of this bond to act as a supersedeas of the judgment heretofore rendered by the Supreme Court of Missouri in the above entitled cause.

In witness whereof the corporations parties hereto, principal and surety, have caused these presents to be executed by their proper officers respectively, and their respective corporate seals to be hereto attached. All done this 15th day of January, 1909.

182 ACME HARVESTER COMPANY,
[SEAL.] By P. D. MIDDLEKAUFF, *President.*
THE BANKERS SURETY CO.,
[SEAL.] FRANK W. WILBUR,
Attorney in Fact.

Bond approved this Jan'y 16, 1909.
LEROY B. VALLIANT,
Chief Justice Supreme Court of Missouri.

183 STATE OF MISSOURI, *sct:*

I, John R. Green, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the record and proceedings had in said Supreme Court in the case wherein the Beekman Lumber Company is Respondent and Acme Harvester Company is appellant, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and the seal of said Court hereto affixed. Done at office in the City of Jefferson, this 30th day of January, 1909.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk,*
By H. L. CREEL, *D. C.*

Endorsed on cover: File No. 21,510. Missouri supreme court. Term No. 148. Acme Harvester Company, plaintiff in error, vs. Beekman Lumber Company. Filed February 10th, 1909. File No. 21,510.

Supreme Court of the United States.

OCTOBER TERM, 1908.

ACME HARVESTER COMPANY,
Plaintiff in Error,

v.

BEEKMAN LUMBER COMPANY,
Defendant in Error.

No.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM THE JUDGMENT OF THE COURT BELOW.

Now comes the above-named defendant in error, by its counsel, and moves the court on the record herein:

1. To dismiss the writ of error herein for want of jurisdiction in this court.

2. To affirm the judgment of the Supreme Court of the State of Missouri, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision and judgment of the said court are obviously correct, and upon the further ground that even if the record shows jurisdiction in this court it is manifest that the writ of error herein was taken for delay only, and the question upon which jurisdiction depends is so frivolous as to need no further argument.

Respectfully submitted.

HANNIS TAYLOR,
Counsel for Defendant in Error.

SIR: Please take notice that the defendant in error in the above action will, on the 5th day of April, 1909, at 12 o'clock, noon, on said day at the opening of said court, or as soon thereafter as counsel can be heard, at the Supreme Court Room, in the City of Washington, District of Columbia, in open court move this court on the record herein:

1. To dismiss the writ of error herein for want of jurisdiction in this court.

2. To affirm the judgment of the Supreme Court of the State of Missouri, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision and judgment of the said Supreme Court of Missouri are obviously correct, and upon the further ground that even if the record shows jurisdiction in this court, it is manifest that the writ of error herein was taken for delay only and the question, upon which jurisdiction depends, is so frivolous as not to need further argument.

Together with this motion the defendant in error serves upon the plaintiff in error a copy of its brief or argument.

HANNIS TAYLOR,
2018 O Street N. W.,
Washington, D. C.

To EDWIN A. KRAUTHOFF,
606 Waterworks Building,
Kansas City, Mo.

In Error to the Supreme Court of Missouri.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

STATEMENT OF THE CASE.

On December 2, 1903, defendant in error, a corporation organized under the laws of Missouri, attached funds in a bank of that State belonging to plaintiff in error, a corporation organized under the laws of Illinois, and having its chief office at Peoria in that State. The suit was to recover $1,453,58 for lumber sold to plaintiff in error, an itemized account of which was annexed to the petition. On December 24, 1903, a motion was filed to stay proceedings on the ground that there was pending against plaintiff in error in the District Court of Illinois a petition in involuntary bankruptcy. On October 12, 1904, plaintiff in error—and not a trustee in bankruptcy, or a receiver appointed by the Court to take charge of its property—filed an answer in the nature of a plea to the jurisdiction presenting questions of fact. When that plea came on for trial on June 20, 1905, it appeared, as a matter of fact, that no adjudication in bankruptcy had been made. To quote the words of the Supreme Court of Missouri "learned counsel for defendant in this Court solemnly admits in open court that, even up to the time of the argument of this cause on appeal to this Court, no adjudication of bankruptcy had been made by the United States District Court for the Southern Division of the Northern District of Illinois. Thus it appears that while a petition in bankruptcy was filed in the bankrupt court on November 23, 1903, against defendant, no adjudication had taken place up to October, 1908. *Plaintiff asserts, and the record sustains its con-*

tention, that on October 26, 1903, an adjudication of bankruptcy was denied. When the record discloses that Judge Kohlsaat, the Judge of the United States District Court, refused to appoint a receiver, and that two years had elapsed before the trial of this case in the Circuit Court of Jackson County, and no adjudication had yet taken place, we think but one rational conclusion can be drawn and that is *that the United States District Court did refuse an adjudication in bankruptcy, and that the steps taken to obtain an adjudication in bankruptcy were abandoned,* and this is buttressed by the testimony showing that with the knowledge and approval of that court a creditors' committee took charge of the affairs of defendant and were administering them, collecting debts due and paying debts owing by defendant. This condition of affairs is utterly irreconcilable with any claim that said District Court has asserted and is asserting jurisdiction as a bankrupt court over the estate of defendant, and has such a custody of said estate as would preclude a creditor from asserting his or its claim against defendant in another court of competent jurisdiction. Certainly an adjudication now could not restore that equality which the bankrupt act contemplates. * * * In our opinion, all these considerations are wholly inconsistent with such a claim, and show, we think, that all idea of such an adjudication has been abandoned, and therefore that the insistence that the mere filing of the petition in bankruptcy without any subsequent adjudication of bankruptcy did *ipso facto* place defendant's property in *custodia legis* of the District Court is not tenable, and the subsequent action of that court convinces us that it in fact refused an adjudication, and that the Circuit Court of Jackson County was not deprived of its jurisdiction by attachment on that ground,

and it properly so held." It thus appears that the decision of the Supreme Court of Missouri rests purely upon a question of fact. After a careful review of all the facts before it that court has ascertained, as a matter of fact, that an adjudication in bankruptcy was denied. Its language is:

"Plaintiff asserts and the record sustains its contention that, on October 26, 1903, an adjudication of bankruptcy was denied. * * * we think but one rational conclusion can be drawn and that is that the United States District Court did refuse an adjudication in bankruptcy and that the steps taken to obtain an adjudication in bankruptcy were abandoned, and this is buttressed by the testimony showing that with the knowledge and approval of that court a creditors' committee took charge of the affairs of defendant."

It thus appears that after a careful review of the "testimony," the State Supreme Court ascertained, as a matter of fact, (1) that "an adjudication of bankruptcy was denied;" (2) "that the steps taken to obtain an adjudication in bankruptcy were abandoned." In its last word on that branch of the case the State Supreme Court said:

"*The subsequent action of that* court convinces us that it *in fact refused an adjudication.*"

That ascertainment of fact this court has no jurisdiction to review. By the writ of error nothing is removed for re-examination but questions of law arising on the record. The findings of fact made in the Supreme Court of the State will be the basis of decision of this court. From the mass of cases on that subject the following may be selected. In Merced Min. Co. *v.* Boggs, 3 Wall.

310, it was held that a decision in the highest court of a State, that no license existed to extract minerals from certain mineral lands (that is, a license inferred from the general policy of federal law) *is a finding of a question of fact*, and not a decision against the validity of the license claimed to exist, and is not a judgment upon a question of law which can be reviewed here. In Eastern Bldg. & L. Asso. *v.* Ebaugh, 185 U. S. 114, where the contention was that the plaintiff in error had been deprived of rights guaranteed by the constitution and laws of the United States, it was held that the question of fact underlying the contention was determined adversely to it by the highest court of the State, and, therefore, that there was no jurisdiction in this court to review that determination. In that case this court said: "This is a writ of error to the State Court, and whatever was a question of fact there is a question of fact here." The conclusion reached was that "a finding of fact by a State Trial Court as to the law of another State and its appreciation under the decisions of the courts of that State is binding upon the Supreme Court of the United States on error to the Supreme Court of the former State, which decided that such finding of the Trial Court was conclusive upon it." This court will not review *inferences of fact from the evidence* on writ of error. Turner *v.* New York, 168 U. S. 90. Questions respecting *the weight of the evidence* cannot be reviewed on writ of error. United States Exp. Co. *v.* Kountze Bros., 8 Wall. 342. Only questions of law apparent on the record can be considered here on writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact. Behn M. and Co. *v.* Campbell, 205 U. S. 403. Here this case must end because the decisive question of fact has been settled

against the plaintiff in error by the State Supreme Court, and there is no jurisdiction here to review that ascertainment.

A word must now be said as to the further contention of plaintiff in error that the Circuit Court of Jackson County, Missouri, was bound to suspend and stay its proceedings, because the District Court of Illinois granted an injunction against the defendant, enjoining it from further prosecuting its suit. Such injunction was granted October 2, 1904, on the petition of plaintiff in error, without notice, or the service of a subpœna on the defendant from said District Court. Upon that subject the Supreme Court of Missouri has said: "Broad and sweeping as the provisions of the bankrupt act are in conferring jurisdiction to grant injunctions to stay suits in other courts, both State and Federal, in order to preserve the estate of the bankrupt and distribute it *pari passu* between and among his creditors, *it is confined by the terms of the act itself to the territorial limits of the jurisdiction of the District Court.*" In support of that conclusion the following cases are cited: Toland *v.* Sprague, 12 Pet. 300, 328; *In re* Waukesha Water Co. (D. C.), 8 Am. Bank. Rep. 715, 116 Fed. 1009; Paine *v.* Caldwell, 1 Hask. 452, Fed. Cas. No. 10, 674; Jobbins' Assignee *v.* Montague, 5 Ben. 422, Fed. Cas. No. 7, 329; *In re* Litchfield (D. C.), 13 Fed. 863. Upon those cases the Supreme Court of Missouri bases this statement:

"If, then, as we have seen, the Bankrupt Court of the Northern district of Illinois was confined by the act of Congress to the territorial limits of said district in issuing process, as has been repeatedly held by the Federal Courts, and could not reach plaintiff, a citizen of Missouri and a resident of the western district of this state, and

said court had and has no power to punish plaintiff for a contempt of said injunction, it seems obvious that said Bankrupt Court acquired no jurisdiction over the person of the plaintiff herein, and, as to it, was of no binding or controlling effect, and presented no obstacle to the further prosecution of its attachment suit. Moreover, all the authorities cited which deny the power of the District Courts in bankruptcy to reach parties outside of their respective districts were causes wherein there had been an adjudication in bankruptcy and an assignee had been appointed and qualified; and if such was the ruling in these cases, how much stronger is the case of the plaintiff in this case, wherein no adjudication of bankruptcy of the defendant herein has taken place five years after the initial steps were taken to have it adjudicated a bankrupt, and wherein no trustee, receiver, or marshal of the District Court has been ordered to take charge of defendant's property, and wherein it appears that by and with the consent of said District Court the affairs and property of defendant continue to be carried on for its benefit by a selected body of its creditors. Under these circumstances how can it be said that the Circuit Court of Jackson County was transcending the proper limits of its jurisdiction in rendering judgment for plaintiff and refusing to accord to the Federal Court proper respect?"

SUMMARY.

The only litigated matter before the Supreme Court of Missouri was the contested question of fact presented by the answer filed October 12, 1904, "in the nature of a plea to the jurisdiction." That court has carefully summarized the evidenced presented for and against that plea. It then sets forth, in definite terms, its ascertainment, as a matter of fact, "that on October 26, 1903, an adjudication in bankruptcy was denied. * * * We think but one rational conclusion can be drawn and

that is that the United States District Court did refuse an adjudication in bankruptcy and that the steps taken to obtain an adjudication were abandoned." This court will not review inferences of fact from the evidence on writ of error. Turner *v.* New York, 168 U. S. 90; Dower *v.* Richards, 151 U. S. 658. Questions respecting the weight of the evidence cannot be reviewed here on writ of error. United States Express Co. *v.* Kountze Bros., 8 Wall. 342. This Court must accept the ascertainment of fact as the State Court made it—"Whatever was a question of fact there is a question of fact here." The vital question of fact having been thus irrevocably settled against the plaintiff in error, there is nothing here upon which a question of law can be predicated. It is merely a moot question which this Court will not consider. Selden *v.* Montague, 194 U. S. 153. When the State Supreme Court ascertained the fact that an adjudication of bankruptcy was denied by the District Court of Illinois, "and that the steps to obtain an adjudication in bankruptcy were abandoned," the claim as to an injunction was necessarily destroyed by that finding. But even if that contention is not sound, it is true beyond all question that the attempted injunction, without notice, to restrain a proceeding in Jackson County, Missouri, was void, because "the bankrupt court of the Northern District of Illinois was confined by the Act of Congress to the territorial limits of said District in issuing process." In no possible aspect of this case can this Court take jurisdiction of it upon this writ of error, which should be dismissed.

Respectfully submitted.

HANNIS TAYLOR,
Counsel for Defendant in Error.

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FILED.
APR 5 1909
JAMES H. McKENN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

ACME HARVESTER COMPANY,
Plaintiff in Error,
vs.
BEEKMAN LUMBER COMPANY,
Defendant in Error.

No. [redacted] 9

Suggestions in Opposition to Motion to Dismiss or Affirm.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

ACME HARVESTER COMPANY,
Plaintiff in Error,
vs.
BEEKMAN LUMBER COMPANY,
Defendant in Error.

No. 714

Suggestions in Opposition to Motion to Dismiss or Affirm.

In the case at bar, the defendant in error has filed a motion (in the alternative) to dismiss or affirm. The ground of the motion to affirm is thus stated: "It is manifest that the writ of error herein was taken for delay only and the question upon which jurisdiction depends is so frivolous as to need no further argument." (Motion of defendant in error, p. 1.)

Instead of the question arising on the merits of the case at bar being "frivolous," it is one of the highest importance, and upon its correct answer, depends much, if not all, the efficiency of the National Bankruptcy Law. In considering the "frivolous"

nature of the question involved, it is proper to call the attention of this court to the fact, that of the seven judges composing the Supreme Court of Missouri, and who participated in the determination of this cause, four of the judges reached one conclusion and three of the judges reached a diametrically opposite conclusion.

Beekman Lumber Co. v. *Acme Harvester Co.* (Mo. Sup.), 114 S. W. Rep., 1087.

The record in the case at bar discloses:

1903, October 22. Petition in bankruptcy filed in the District Court of the United States for the Northern District of Illinois, Southern Division, against Acme Harvester Company.

1903, December 7. Action on an open account instituted in the Circuit Court of Jackson County, Missouri, by Beekman Lumber Company against Acme Harvester Company and an attachment sued out in that action.

1904, October 3. The court in which the proceeding in bankruptcy had been filed against Acme Harvester Company, did, on application of that company, restrain and enjoin the prosecution of the action so instituted aforesaid by Beekman Lumber Company against Acme Harvester Company. No application was ever made to have this order of injunction vacated or set aside and so far as the record in this case is concerned (and such is the fact outside the record), this order is still in full force and effect.

1904, October 12. Defendant in the case at bar filed an answer pleading the injunction issued in Illinois and denying generally the allegations of the petition.

1905, June 20. Plaintiff filed a replication in which it denied generally each and every allegation of new matter contained in the answer. It will be noted that plaintiff did not contend in the trial court that the proceeding in bankruptcy in Illinois had been abandoned and did not file any pleading setting up that contention.

A trial was had and at the conclusion of the evidence the trial judge gave a peremptory instruction to the jury to find in

favor of plaintiff. We shall contend in the latter part of this brief that in the state of Missouri (and such is the general rule) the action of a trial judge in giving a peremptory instruction to a jury to find an issue in favor of either the plaintiff or defendant, does not present, on appeal, *a question of fact,* but, on the contrary, presents for review purely a question of law.

Thereupon an appeal was taken by the Acme Harvester Company from the judgment rendered against it in the Circuit Court of Jackson County, Missouri, at Kansas City, in favor of Beekman Lumber Company.

This court had occasion in Missouri, etc., *Railway Co.* v. *Elliott,* 184 U. S., 530, to analyze and consider the structure of the appellate system of judicature in the state of Missouri. It was pointed out (184 U. S., 535), that in the state of Missouri, certain actions were appealable to a court of appeals and certain actions were appealable to the Supreme Court of Missouri:

In First Revised Statutes of Missouri (1899), page 87, it is provided:

"ST. LOUIS COURT OF APPEALS—JURISDICTION—APPEALS TO THE SUPREME COURT.—There is hereby established in the city of St. Louis, an appellate court, to be known as the St. Louis Court of Appeals,' the jurisdiction of which shall be co-extensive with the city of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of ***habeas corpus, quo warranto, mandamus, certiorari,*** and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other

political subdivision of the State or any State officer is a party, and in all cases of felony."

An examination of this section will show that when the St. Louis Court of Appeals was created by the constitution of Missouri, adopted in the year 1875, it was provided: "In cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question," an appeal could be taken from a court of appeals to the Supreme Court.

In the year 1884, a constitutional amendment was adopted in Missouri (1st R. S. Missouri, 1899, p. 93). In that amendment, it is provided:

"SUPREME COURT, EXCLUSIVE APPELLATE JURISDICTION OF. —In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the circuit courts and to courts having the jurisdiction pertaining to circuit courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

From this amendment, it will be seen that in cases appealable in Missouri in which, as provided in the constitution of 1875, "The validity of a treaty or statute of or authority exercised under the United States is drawn in question" an appeal now goes directly to the Supreme Court of Missouri and not to a Court of Appeals.

Accordingly it will be found in consulting the opinion filed in this case in the Supreme Court of Missouri, that considerable attention was paid by the Supreme Court of Missouri to the question of its own jurisdiction. The pecuniary amount involved being less than $2,500.00, the Supreme Court of Missouri had no jurisdiction of the appeal, except upon the ground that a federal question was involved. That court sustained its own jurisdiction to review the judgment complained of by ruling that a federal question was involved.

Again, it is provided in a constitutional amendment in Missouri, adopted in the year 1890, that the Supreme Court of Mis-

souri shall consist of two divisions and the record in this case discloses that this case was originally heard in division number two and that the three judges composing that division were unanimous in the opinion affirming the judgment appealed from.

But there is a provision in the constitutional amendment of 1890, to the following effect (1 R. S. Missouri, 1899, p. 95):

"CASE TRANSFERRED TO COURT EN BANC, WHEN.—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, *or when a federal question is involved*, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

So that a federal question being involved, division number two of the Supreme Court of Missouri transferred the case to the court *en banc* and the jurisdiction of the court *en banc* to reveiw the case was predicated of the fact that a federal question was involved.

So then we have this state of the case: A petition in bankruptcy is filed in a district court of the United States against a corporation coming within that class of corporations subject to the operation of the bankruptcy law. Pending the petition in bankruptcy, a creditor of the corporation so proceeded against, resorts to a state court and there institutes an action in attachment and seeks to subject to the payment of his debt *in full*, the assets of this corporation so being proceeded against in bankruptcy.

It is respectfully submitted that if such a proceeding is maintainable, the efficiency of the bankruptcy law is at an end. The theory of the bankruptcy law is that the assets of a bankrupt corporation shall be distributed equally among all of the creditors of the bankrupt of the same class; one court shall take jurisdiction of all of the assets and all the creditors; the intent is equity; the race is not hereafter to the swift, nor the battle to the strong, but all of the assets of the bankrupt corporation are to be equally divided among all of the creditors. What becomes of this theory,

if one of the creditors can, while the proceeding in bankruptcy is pending, pay his debt in full by attaching property of the corporation proceeded against in bankruptcy and applying this property in payment of his debt?

Indeed it is provided in the criminal sections of the National Bankruptcy Law (30 Stat. L., 554, Sec. 29), that it shall be an offense to receive "any material amount of property from a bankrupt after the filing of the petition, with attempt to defeat this act." The record in the case at bar discloses that in the action in attachment instituted by the Beekman Lumber Company against the Acme Harvester Company in the state court in Missouri a garnishment was served upon a bank and that there was to the credit of the Acme Harvester Company in that bank a sum of money aggregating in excess of $1,400. If after the filing of the petition in bankruptcy the Acme Harvester Company had voluntarily given its check to the Beekman Lumber Company for the amount of this deposit and the Beekman Lumber Company, with knowledge of the filing of the petition and with the intent to defeat the operation of the act, had received this check and had cashed the same, the Beekman Lumber Company would have committed an offense, punishable by fine or imprisonment. How may a court then become an accessory after the fact to a crime and aid in the accomplishment of, under the process of law, what the parties themselves could not have accomplished without committing a crime?

In a leading case it is said by this Court: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction."

Mueller v. *Nugent*, 184 U. S., 114.

Accordingly, it has been ruled:

"The filing of the petition in bankruptcy was a caveat to *all the world*. It was in effect a caveat and an injunction. Thereafter all the property rights of the debtors were *ipso facto* in abeyance until the final adjudication. * * * No matter where the property of the bankrupt estate may have its situs, *if within the United*

States, it passes to and vests in the trustee. Under the scheme of the bankrupt act, the District Court of *the domicile* of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, *wherever situate.* There are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction."

In Re Granite City Bank, 137 Fed., 818, *et seq.* (Philips, J.):

In that case, a district court of the United States, sitting in Iowa, assumed jurisdiction of property situate in South Dakota and required a citizen of South Dakota to submit to the court in Iowa the claims of that citizen to the property in question.

In *Markson* v. *Heaney,* Fed. Cas., 9098; 1 Dillon, 479, it was held (Dillon, J.), that a court of bankruptcy in which a petition in bankruptcy was pending (in that case a court in Kansas) might enjoin a citizen of Minnesota from maintaining in Indiana an action against the bankrupt instituted after the petition in bankruptcy was filed. "Congress in passing the (bankrupt) act, in pursuance of its constitutional power, not only intended to make it uniform, but operative throughout the United States. It does not stop at state lines. * * * It would be destructive of the system itself to permit suitors by resorting to state tribunals, to withdraw against the will of the bankruptcy court, property or cases which belong to its jurisdiction. * * * Creditors wherever residing within the United States are within the operation of the act. * * * It is plain, beyond controversy, that the property of the bankrupt though situate in this case in another state, is within the jurisdiction and under the control of the bankrupt court in Kansas."

Judge Dillon then quoted from *Ex parte* Christy, 3 How. (U. S.), 221 (Story, J.), to the effect "the jurisdiction was confided to a single court * * * in preventing by injunction, or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the state tribunals."

The same doctrine is announced *In Re Richardson,* 2 Benedict (U. S.), 517; Fed. Cas. No. 11774. (Blatchford, J.)

"The bankrupt's property is within the jurisdiction of the bankruptcy court *as soon as the petition is filed.*"

In Re Weinger, Bergman & Co., 126 Fed., 875, 876.

To the same effect, 138 Fed., 627.

"The (bankruptcy) court may * * * restrain, not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, *or from any interference therewith.*"

In Re Jersey Island Packing Co., 138 Fed., 625, 629.

In Re Union Trust Co., 122 Fed., 937, it is held the word "estate" as used in section 2, of the bankruptcy law, authorizing courts of bankruptcy to "cause the estates of bankrupts to be collected," covers all property in the possession of the debtor when the proceedings are instituted.

The stay of suits against the bankrupt pending the bankrupt proceedings is absolutely necessary to give effect to the bankrupt act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2, clause 15, necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, as the greater power includes the less. The debt being contracted prior to the adjudication, the creditor is a party to the (bankruptcy) proceeding.

In Re Brasch, 97 Fed., 761, 762.

"Coincident with the filing of the petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. * * *

"Such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt to the end that when the adjudication is made, the trustee may be vested not only with the bankrupt's title to the property, but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked. * * * Manifestly, the jurisdiction of this court having attached before that of any other court," it was held proper to enjoin subsequent proceedings in a state court.

In Re Kleinhans, 113 Fed., 107, 109.

"Where a creditor claiming a mechanic's lien on property of a person who has been adjudged bankrupt, over which the court has acquired jurisdiction, brings an action in a state court for the foreclosure of such lien without leave of the bankruptcy court, it is an unwarrantable interference with the assets of the bankrupt in the custody of the latter court, and the further prosecution of such action will be stayed."

In Re Emslie, 102 Fed., 291, 292.

"These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with, the property of the bankrupt. They are but creditors of the bankrupt who have, in their effort to collect their money, sought an advantage which the law does not give, and they cannot gain any favored position by reason of an act of theirs which the law condemns."

Bear v. *Chase,* 99 Fed., 920, 924.

The general doctrine contended for on this writ of error by the Acme Harvester Company was fully recognized in the dissenting opinion filed in the Supreme Court of Missouri by Judge Woodson, Lamm and Graves, JJ., concurring. (114 S. W. Rep., 1097, 1908.)

In the opinion of the majority, it is stated:

"That the United States District Court had jurisdiction to adjudicate the defendant a bankrupt is not questioned." (114 S. W. Rep., 1091.)

"That property in the legal custody of a court of competent jurisdiction is not subject to seizure by judicial process from another court * * * and the court in which jurisdiction first attaches must prevail." (114 S. W. Rep., 1092.)

"That if an adjudication in bankruptcy had been entered the District Court of the United States in Illinois, would have had exclusive jurisdiction over the estate of the defendant wherever found." (114 S. W. Rep., 1092.)

In passing on the correctness of the other views entertained by the majority of the Supreme Court of Missouri and which other views are questioned on this writ of error, it is important to bear in mind the cardinal principles of the national bankruptcy law.

"The object of a bankrupt act, so far as creditors are con-

cerned, is to secure equality of distribution among them of the property of the bankrupt—not among some of the creditors, but among all of them."

Pirie v. *Chicago Title & Trust Co.*, 182 U. S., 438, 449.

"The duty of the courts is to carry this intention of Congress into effect to the extent which the language of the act justifies. Mere schemes and artifices to avoid the letter and spirit of the law will not be tolerated."

In Re Blount, 142 Fed., 263, 265, 266 (Arkansas, Trieber, J.).

Under the bankruptcy law of 1867, arose the case of *Morgan* v. *Campbell*, 22 Wall, 381, and there was a contest between a landlord and an assignee in bankruptcy. A petition in bankruptcy had been filed on May 14, 1873 (22 Wall., 384), and on May 17 (*four days later*) the landlord issued his warrant to the sheriff "for distraining the goods and chattels of his tenants then on his premises to pay the rent due; and on the same day the sheriff did levy the warrant upon them, and held them under the warrant on the premises."

This court stated the question to be, if the landlord had no lien on the personal property of the tenant independently of *and prior to the levy of the warrant of distress*, "then the assignee in bankruptcy would take the property for distribution among the creditors generally; it being clearly settled *that no lien can be created after the filing of a petition in bankruptcy.*" (22 Wall., 384, 385.)

In the course of the opinion it is said (Mr. Justice Davis): "The object of the (national bankruptcy) law was evidently to prevent anyone procuring a lien after the filing of the petition who had not got it before; if the lien existed before the filing of the petition it could be enforced in the bankruptcy court. But if it did not exist the purpose of the law was to prevent its being brought into existence by any proceeding whatever. If this were not so, as soon as it was known that the petition was filed the provisions of the law might be easily evaded. The main purpose which the bankrupt act seeks to accomplish is to distribute the property of the bankrupt equally among his creditors, and in order to do this the creditor who has not, when proceedings are begun, such a security as binds the property, is prevented from obtaining it, and thus securing a preference over another creditor. * * *

It was the object of this section (fourteenth Sec. of the bankrupt law of 1867) to prevent acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and any proceeding by which this is attempted is within the condemnation of the law."

Under the bankruptcy law of 1898, this court has decided (*Clarke* v. *Larrimore*, 188 U. S., 486), that, if, while money collected on an execution is still in the possession of the sheriff and while not yet paid to the plaintiff, a petition in bankruptcy is filed against the judgment debtor, the money in the hands of the sheriff goes to the trustee in bankruptcy.

As illustrating the force and effect of a pending petition in bankruptcy, the case of *Cruchet* v. *Red River Mining Company*, 155 Fed., 486, is instructive. In that case it was held (Colt, J.), that a circuit court of the United States in Massachusetts would not entertain jurisdiction of a creditor's bill against a corporation, it appearing that a proceeding in bankruptcy was pending against this corporation in the District Court of the United States for the District of Colorado.

The statement in that case shows that the petition in bankruptcy was filed on March 18th, 1905, in Colorado, and that on April 21, 1905, a creditor's bill was filed in Massachusetts and a receiver was appointed in Massachusetts. The court said: "The bill did not allege the pendency of bankruptcy proceedings in Colorado, nor was this fact in any way brought to the attention of the court. If it had been, the court would have refused to take jurisdiction of this bill, since it would be a manifest disturbance of the fundamental principles of the bankrupt act, and lead to endless confusion, for the circuit courts to entertain creditors' bills like the present one *after the commencement of proceedings in bankruptcy against the insolvent.* Nor are we aware that any circuit court has ever entertained such a bill, and appointed a receiver, where it had notice that bankruptcy proceedings had already been commenced against the defendant."

In *State Bank of Chicago* v. *Cox*, 143 Fed., 91, a petition in bankruptcy was filed in New York on August 20, 1901. One

day later, August 21, 1901, proceedings in attachment were commenced against the bankrupt in Cook County, Illinois. Before an adjudication was entered in New York, the proceedings in attachment in Illinois eventuated in a final judgment and the plaintiff in the action received the money. Thereafter the trustee in bankruptcy sued the plaintiff in the attachment for a recovery of the money. The Court held: "It is the established doctrine that bankruptcy proceedings are *in rem*, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subject to the bankruptcy court, and that, when bankruptcy is adjudicated the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as a caveat to all the world, preventing interference or attachments or other means in derogation of the interests of the estate."

The action of the plaintiff in that attachment was spoken of as a "spoliation of estates subject to bankruptcy proceedings" (143 Fed., 94, and as a transaction "prohibited by the act."

See also Central Law Journal, April 6, 1906, p. 254.

In the majority opinion of the Supreme Court of Missouri, it is conceded that the District Court in Illinois had the power to issue injunctions "to restrain proceedings in the state court within the territorial limits of its own district"; but it was held that the federal court in Illinois had no power to enjoin proceedings pending outside of its district.

In Loveland on Bankruptcy (3rd Ed.), p. 105 *et seq.*, the power of a court of bankruptcy to stay proceedings pending in other courts is discussed at length. "The courts of bankruptcy have enjoined proceedings in federal courts when such proceedings interfered with the exercise of bankruptcy jurisdiction." (P. 105.)

In Re Kenney arose in the district court (95 Fed., 427). At that stage in the proceedings (July 7, 1899), it appeared that a petition in bankruptcy was filed against Kenney on April 13, 1899. A judgment had been recovered against Kenney by one Clarke in March, 1899, and property of Kenney had been sold under the

execution. "The sheriff having collected the money upon the execution sale made prior to the filing of the petition, a stay of proceedings was obtained against the payment of the monies upon the execution by the sheriff, and this stay is now asked to be continued."

The judgment creditor opposed the stay, but an order was made: "The stay is continued and an order may be entered directing the payment of the monies *to the trustee when appointed.*"

In Re Kenney came on again for hearing in the district court (97 Fed., 554). At that stage in the proceedings, November 14, 1899, a trustee in bankruptcy had been appointed, and at that time, the money was ordered paid to the trustee in bankruptcy.

An appeal was taken and the case was heard in the United States Circuit Court of Appeals for the Second District (*In Re Kenney*, 105 Fed., 897), and the ruling was affirmed, it being held: "There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining a preference over other creditors as the result of any legal proceedings against him during the period of four months prior to the filing of the petition." (105 Fed., 898.)

In Re Kenney, supra, was affirmed by this Court *sub nom., Clarke* v. *Larrimore*, 188 U. S., 486.

The opinion in *Wagner* v. *United States*, 104 Fed., 133, is by (now Mr. Justice) DAY. In that case one, Houston, filed a petition in bankruptcy. At the time, an order had been made in a state court directing him to pay alimony and he was threatened with punishment for contempt of the order of the state court. The bankruptcy court discharged him from the custody of the state court. On appeal the court said:

"The question elaborately argued, and which we deem unnecessary to decide, is whether a decree for alimony is a provable debt under the bankrupt law. The real issue to be determined here is as to the force and effect of the order made within the jurisdiction conferred by law upon the bankruptcy court. It seems to us it is immaterial whether the court's view of the provability of the alimony claim in bankruptcy is sound or unsound. Jurisdiction

is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when an application is presented to it for a restraining order under this power to determine whether the claim is thus provable, an erroneous decision does not make void the judgment of the court. It is unnecessary to cite authorities upon the proposition that an order within the jurisdiction of the court, until reversed, is binding and conclusive upon all parties."

In Re Goldberg, 117 Fed., 692, it appears that a petition in bankruptcy was filed on August 7, 1902,,and that prior thereto, on July 19, 1902, an action in attachment had been instituted against Goldberg in a state court. The court in bankruptcy issued an attachment against the further prosecution of the action in attachment. The court said: "If, by the use of attachment proceedings, one creditor is permitted to take and dispose of the property in the manner attempted in this case, the law is nullified." (117 Fed., 695.)

In Re Gutwillig, 90 Fed., 481, a sheriff was enjoined from proceeding with a writ of replevin against a person against whom a proceeding in bankruptcy was pending.

One of the early cases arising under the national bankruptcy law of 1898 was *West Company* v. *Lea,* 174 U. S., 590. In that case a petition in bankruptcy was filed December 18, 1898. In this Court, the only question presented was stated: "Is the solvency of a general assignor, a defense to a proceeding in bankruptcy, the ground of the proceeding being the execution of a general assignment for the benefit of creditors?"

But in the District Court (*Lea* v. *George M. West Company*), 91 Fed., 237, it was held that the court of bankruptcy had the right to enjoin the proceedings in the state court, which proceedings in turn had for their object the administration of the estate. Otherwise, "the anomalous condition would exist of one court dealing with the bankrupt and his creditors, and another court administering his estate." (91 Fed., 239.)

In Loveland on Bankruptcy (3rd Ed.), p. 110, we find a

number of cases in which courts of bankruptcy have granted injunctions to stay proceedings in state courts.

In 1 Remington on Bankruptcy, Section 1805, page 1100, it is said: "Obstructive suits brought after the bankruptcy court has obtained custody of the property involved, which interfere with the jurisdiction of the bankruptcy court over third parties, will be disregarded if brought in the same federal court, or be enjoined if brought in the state court."

And in the same volume it is said (Section 1908): "Court proceedings whereby it is attempted to levy upon or seize property in the custody of the bankruptcy court may, of course, be enjoined; thus as to attempts to levy execution on property in its custody."

It was ruled in the court below, that while the District Court of the United States in the District of Illinois might have had jurisdiction to restrain a plaintiff in an action pending in a state court in Illnois, yet such jurisdiction did not extend to the instance of a plaintiff in a state court in Missouri.

"That the distinction has been maintained between the power of the District Court in Bankruptcy in issuing injunctions to restrain proceedings in state courts within the territorial limits of its own district, and its power to enjoin such proceedings outside of its territorial jurisdiction is clear we think from an examination of the federal authorities." (114 S. W. Rep., 1094.)

Previously in the course of this brief we have called attention to the ruling of Judge Dillon (*Markson* v. *Heaney*, Fed. Cas., 9098), to the effect that a district court in Kansas might enjoin a citizen of Minnesota from maintaining an action in Indiana. A district court of the United States in exercising jurisdiction in a proceeding in bankruptcy is administering a law which has for its basis a constitutional grant of power to enact such a law; consequently, the jurisdiction of the court is co-existent with the constitution. That is to say, the power of a federal court in bankruptcy follows the constitution, and so the rule has been stated.

In Re Granite City Bank, 137 Fed., 818 *et seq.*

It is fundamental in the law that there is no right without a remedy. We have pointed out, that to enable a plaintiff to maintain an action in attachment against a corporation that is being proceeded against in bankruptcy and to permit that plaintiff to prosecute the attachment action to a final judgment and to collect that judgment by appropriating the assets of the defendant in payment of it, is to permit that very preference of creditors which the bankruptcy law seeks to avoid. If the Beekman Company had instituted this action in attachment in the state of Illinois and in the northern district thereof, the power of the court in bankruptcy in Illinois to have enjoined the prosecution of the action is beyond question.

The court below proceeded upon the theory that the district court in Illinois could not enjoin the maintenance of a proceeding outside of the state of Illinois. It is significant that only one case is cited under the bankruptcy law of 1898. (*In Re Waukesha Water Co.*, 116 Fed., 1009.)

That case is cited in the dissenting opinion in this Court *In Re Wood & Henderson*, 210 U. S., 246. In the last named case, the majority of the court ruled that a bankruptcy court in Colorado did have jurisdiction of attorneys who lived in Arkansas, and did have the right, as against attorneys who lived in Arkansas, to examine into the reasonableness of attorneys' fees paid by a bankrupt to his attorneys and to make an order against such attorneys, although such attorneys did not live in and were not personally served with process in the district of Colorado.

The Waukesha case was also cited in 131 Fed., 123; 131 Fed., 825. At the former citation, the question now being discussed was not considered. At the later citation, it was ruled by the District Court of the United States for the Eastern District of Arkansas, that a person who was not an officer or a member of a bankrupt corporation nor a resident of the Eastern District, could not be proceeded against in the Eastern District on a summary proceeding maintained in a court upon service made out of the District.

As against these rulings of district courts, we call attention to *In Re Wood & Henderson,* 210 U. S., 246. Wood & Henderson lived in Arkansas and one Williams was adjudicated a bankrupt in Colorado. A referee in bankruptcy in Colorado issued an order directing Wood and Henderson, citizens of Arkansas, to appear in Colorado "and show cause, if any they had, why an order should not be made determining and adjudicating the reasonable value of the services rendered by the said attorneys for said bankrupt," and that in default of their appearance, the referee would proceed to hear and determine the matter on the evidence presented.

Service was made on Wood and Henderson in Arkansas and they did not appear in Colorado and the referee made an order upon Wood and Henderson to pay the trustee in bankruptcy $8,995.00.

The court ruled: "The section makes no provision for the service of process and in that view, such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be here. We see no reason why notice of the proceedings under Section 60D may not be by mail or otherwise, as the court shall direct, so that an opportunity is given to appear in court where the estate is to be administered and contest the reasonableness of the charges in question. Congress has the right to establish a uniform system of bankruptcy throughout the United States, and, having given jurisdiction to a particular district to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights." (210 U. S., 253, 254.)

In Re Wood and Henderson, 210 U. S., 246, is an outgrowth of *In Re Williams,* 120 Fed., 34. Originally Williams was proceeded against in bankruptcy in Arkansas, and when so proceeded against, Williams claimed that he had not been in the district of Arkansas for the greater portion of the six months preceding the filing of the petition and the petition filed against Williams in Arkansas was dismissed. (120 Fed., 34.) Then Williams was proceeded against in Colorado and it appears (*Lockman* v. *Lang,*

132 Fed., 15), that the petition in bankruptcy against Williams was filed in Colorado on January 8, 1903. It further appears that Williams could not be found in Colorado and that personal service upon him could not be made in Colorado and notice was given to Williams by publication. Pending the hearing of that proceeding, an amended petition in bankruptcy was filed and an order was made that this amended petition should be answered within one day. Thereupon an adjudication in bankruptcy followed and an appeal was taken, and pending the appeal, Williams died and the case was revived in the name of his administrator and is reported on appeal as *Lockman* v. *Lang, supra.* It was ruled on that appeal, that the time given to answer to the amended petition was too short and the case was reversed and remanded and thereafter (*Lang* v. *Lockman*, 135 Fed., 197), an adjudication in bankruptcy was entered.

So that *In Re Wood and Henderson, supra,* we find a proceeding instituted in Colorado against a person who at that time is not in the state of Colorado, and we find service obtained by publication. This in turn is followed by an adjudication at a time when the person so proceeded against has died and is represented by the administrator of his estate. Then this proceeding is made the basis of a further proceeding against attorneys in Arkansas who are subjected to the jurisdiction of the court in Colorado and this court holds that may be done.

But if it be conceded that a district court of the United States sitting, for instance, in Illinois, has no jurisdiction to enjoin a proceeding by attachment in the state of Missouri, and if it be further conceded that pending the bankruptcy in Illinois, courts in other states may administer the estate of the bankrupt, what becomes of the equality provided for by the bankruptcy law? Necessarily somewhere, in some court, there must exist jurisdiction of some nature, to prevent the accomplishment of the result which is sought by the plaintiff in the case at bar.

Where is that jurisdiction vested? In the opinion filed in the Supreme Court of Missouri, stress was made of the fact that no appearance was being made and no contention had on the part of a trustee in bankruptcy. This is not important, because prior to a rendering of an adjudication in bankruptcy and prior to a meeting of creditors there could not be any trustee in bankruptcy.

Should a receiver have been appointed in the District Court of Illinois? If the court in Illinois had no jurisdiction to issue an injunction *with extra territorial effect,* then the court in Illinois had no jurisdiction to appoint a receiver who would have *any extra territorial powers.* Indeed, it has been ruled that a receiver in bankruptcy has no power to institute any suit or proceeding.

In Re Schrom, 97 Fed., 760, a petition in bankruptcy was filed in Iowa and a receiver was appointed in Iowa and an application was made in Iowa for an order directing the receiver in Iowa to take possession of property in Illinois. The court declined the application, on the ground that the property in Illinois was not within the jurisdiction of the court in Iowa and that a receiver in Iowa had no right to take the property in Illinois.

It has also been held that a receiver had no power to bring a suit even in the district court of his appointment to recover possession of property.

Guaranty Title & Trust Co. v. *Pearlman,* 144 Fed., 550;
Boonville National Bank v. *Blakey,* 107 Fed., 891;
In Re Kolin, 134 Fed., 557.

If it be contended that the remedy is to be found in the filing of an ancillary petition in bankruptcy in Missouri, and by calling on the bankruptcy court for the western district of Missouri to protect the situation, then we have the ruling of the United States Circuit Court of Appeals for the Eighth circuit:

"There are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction." (137 Fed., 818, 822.)

In Re Williams, 123 Fed., 321, Hammond, (J.), decided in Tennessee, and *In Re Williams,* 120 Fed., 38, Trieber, (J), decided in Arkansas, are to the effect that there is no such thing as an ancillary proceeding in bankruptcy.

Ross-Meeham Foundry Co. v. *Southern Car & Foundry Co.,* 124 Fed., 403 (Hammond, J.);

In Re Tybo Mining & Reduction Co., 132 Fed., 137.

In Re Von Hartz, 142 Fed., 726, is by the United States Circuit Court of Appeals for the second circuit and is to the same effect. That opinion rendered by the Circuit Court of Appeals for the second circuit has the effect of overruling the opinion by Judge Holt *in Re Sutter Bros.,* 131 Fed., 654, rendered in the district court for the Southern District of New York. Judge Holt could not concur *in Re Williams, supra* (131 Fed., 655). The Circuit Court of Appeals for the second circuit said: "We fully concur with the reasoning in those causes."

Hull v. *Burr,* 153 Fed., 945, is by the Circuit Court of Appeals for the Fifth Circuit: "We find no provision of the act which expressly or impliedly makes provisions for summary proceedings or for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt estate."

"Ancillary bankruptcy proceedings are not maintainable."
Remington on Bankruptcy, Sec. 1705.

There may be cases to the contrary. Of these Sutter Bros., *supra,* is nullified by *In Re Von Hartz, supra. In Re Schrom, supra,* decided in Iowa, insofar as it may impliedly recognize ancillary proceedings is nullified by *In Re Granite City Bank, supra,* decided by the United States Circuit Court of Appeals for the eighth circuit.

In Re Benedict, 140 Fed., 55, decided in Wisconsin, is to the contrary and if the judgment of the Supreme Court of Missouri in this case is to be affirmed on the ground that an ancillary proceeding in bankruptcy should have been instituted against the

Acme Harvester Company in the District Court of the United States for the Western District of Missouri and that court should be called upon to protect the situation, then such an announcement of the law by this Court should be made in terms so clear that they could not be mistaken. The case ought not to be disposed of on a motion to dismiss or affirm, but this Court should file an opinion setting out the law as announced by it, so that, whatever may be the result in this case, the vexatious question of the maintainability of ancillary proceedings in bankruptcy under the bankruptcy law of 1898 may be definitely settled.

But in the opinion rendered in the court below, it is said:

"One fact stands out prominently in this record, and that is that this plea of want of jurisdiction on the part of the circuit court of Jackson county to render judgment against the Acme Harvester Company is not made by a trustee in bankruptcy of said Harvester Company appointed by the United States District Court, or by a receiver appointed by said court to take charge of the property of the said Harvester Company, but is made by the defendant, the Acme Harvester Company, itself." (114 S. W. Rep., 1091.)

In the course of this brief, it has already been pointed out that a trustee in bankruptcy could not have interposed the defense nor have had any standing, because until adjudication, there is no trustee in bankruptcy.

It has also been pointed out that a receiver appointed *in Illinois* would have had no standing *in the state of Missouri, and that no ancillary proceedings in bankruptcy could have been maintained in Missouri.*

Hereinafter we shall point out the right and the duty of the bankrupt to protect the estate in bankruptcy until an adjudication and the appointment of a trustee.

All of the cases recognize the doctrine, that pending the proceeding in bankruptcy, the estate of the bankrupt should in some way be held intact, and that the duty is cast always upon some court, in some jurisdiction, in some form of action, to accomplish this end.

In the opinion filed in the court below, the case of *In Re Waukesha Water Company,* 116 Fed., 1009, is cited. There is nothing in the opinion of that court which militates against the conclusion that a suit was maintainable by the trustee in bankruptcy of that company against the respondents in that case in the state of Illinois, the place of their residence.

So far as the opinion *In Re Waukesha Water Company* is based on the proposition that the respondents are "cited by publication and notice through the mails," it will be recalled, *In Re Wood and Henderson,* 210 U. S., 246, 253, it was ruled by this Court, that where a given section of the bankruptcy law made no provision for the service of process, notice of the proceedings might be by mail or otherwise, "as the court shall direct, so that an opportunity is given to appear in the court where the estate is to be administered."

In *Paine* v. *Caldwell,* Fed. Cas. No. 10674, a suit was brought in Maine by a trustee in bankruptcy appointed in Maine, against a citizen of Massachusetts who was not in the state of Maine. It was pointed out "the state courts are ready to exercise jurisdiction over their own citizens in suits against them in behalf of assignees in bankruptcy."

In Re Litchfield, 13 Fed., 863, relied on as an authority in the court below (114 S. W. Rep., 1095), it was held: "Exceptional power is given to the district courts in bankruptcy cases to enjoin proceedings in the state courts—a power which has never been questioned since the decision of the supreme court in *Ex Parte Schwab,* 98 U. S., 240." "But," said the court, with respect to an assignee in bankruptcy, "it is now settled that he may sue and collect the assets of the bankrupt *within other districts than his own.* Within the same ruling I see no objection to his filing a bill or bills in the circuit or district court of this district calling upon the respondent to come into such court and have his rights adjusted, and praying that he meanwhile be restrained from further prose-

cuting his actions in the state courts, or from interfering with the logs in the possession of the boom company." (13 Fed., 869.)

In Re Schrom, 97 Fed., 760, a district court in Iowa refused to instruct its receiver to take possession of property in Illinois. It was held: "The proper course to pursue is for the petitioning creditor to take proceedings in the proper court, *state* or federal, in Illinois, in their own name, setting up the proceedings now pending in bankruptcy in this court as the basis of their action, and asking that court to protect the rights of creditors in the property situate in Illinois, either by the appointment of a receiver, by injunction, or any other proper remedy."

In Re Williams 120 Fed., 38, it was decided that a court of bankruptcy in Arkansas could not exercise ancillary jurisdiction in aid of a proceeding in bankruptcy pending in Colorado. It was further stated of the petitioning creditors: "They may proceed either *in the courts of this state* or the circuit court for this district, setting up the proceedings now pending in bankruptcy in the Colorado court, and ask the court to protect the rights of the creditors in the property situate in this district, either by an injunction or the appointment of a receiver."

"Before the appointment of an assignee (or trustee) proceedings for an injunction to protect the property of the bankrupt *may be instituted by the bankrupt* or the petitioning creditor."

Blake v. *Francis-Valentine Co.,* 89 Fed., 691, 697.

In *Jones* v. *Leach, Fed. Cas.,* No. 7475, the complainant Jones filed a petition to be adjudged a bankrupt. Thereupon Jones brought a suit to enjoin a sale of his property by a sheriff under process issued by a state court. It was said: "Has the complainant (there not having been time for the appointment of an assignee) the right to file this bill or interfere on behalf of the general creditors? By the act the bankrupt is required to render all needful aid to preserve and collect the estate for the benefit of the creditors. By a general rule adopted by this court, the petitioner is made the custodian of the property surrendered, until an assignee shall have been appointed, and he is held amenable to the court for any negligence in relation thereto. It is impossible under the rules and orders of this court that an assignee other than a provisional one, can be appointed in less than about fifteen days

after the filing of the petition, and frequently a much longer time elapses before an appointment is made. Creditors may be absent and know nothing of the condition of the property; therefore the petitioner is not only authorized; but it is his duty, to apply for such remedy as may be necessary to protect the estate. Besides, he has an interest in it; he may not obtain a discharge; in that event the property becomes his, subject to such liability as may have attached to it."

In Re Klein, 97 Fed., 31, the application of the bankrupt Klein, asking for the appointment of a temporary trustee in the nature of a receiver, was sustained.

In Re Mallory, Fed. Cas. R, No. 8991, Mallory having been adjudicated a bankrupt, filed a petition in the bankruptcy court for an injunction against a sheriff restraining the sheriff from selling property levied on under process from a state court. The court said: "The main question argued was as to the power of this court sitting in bankruptcy to enjoin a sheriff of a state court or parties litigant therein from proceeding to sell property levied upon by virtue of a writ of execution issued out of the state court upon a judgment obtained therein before the proceedings in bankruptcy were commenced. * * * *The question is one of the utmost importance."*

The case cited contains an exhaustive review of the authorities, and then the decision of the district court was affirmed by the circuit court, Mr. Justice Field sitting, the circuit court saying (of the opinion in the district court): "I find that it covers every question in the case, and presents the law in a very clear and satisfactory manner. It renders any opinion from me entirely unnecessary. I could not add to it nor improve it. I concur both in its reasonings and conclusion."

In Re Bowie, Fed. Cas., No. 1728, a petition for an injunction was filed by a bankrupt. "Before the appointment of assignee, such a petition could only be filed by the bankrupt."

In Ex Parte Foster, Fed. Cas., No. 4960, Foster filed a petition in bankruptcy. "Not having as yet been declared a bankrupt, because the time has not yet arrived when the petition is to be

heard in the district court," Foster filed a petition on the equity side of the court, seeking relief against certain attachments in a state court by asking for an injunction enjoining the creditors from further proceedings against the property attached. The opinion is by Mr. Justice Story, and is exhaustive in its consideration of the subject. It was held that on application of Foster, who had not yet been adjudicated a bankrupt, and until he had been adjudicated a bankrupt, or the proceeding had been dismissed, the injunction should issue. It appears the district court certified the question of law to the circuit court and in the circuit court the question was answered by Mr. Justice Story.

In Re Hufnagel, Fed. Cas., No. 6837, it stated by Judge (afterwards Mr. Justice) Brown: "Bills have frequently been sustained enjoining sheriffs of state courts from selling the property of bankrupt upon execution, where it was made to appear that the estate would be injuriously affected."

In Re Ulrich, Fed. Cas., No. 14328, the opinion is by Judge (afterward Mr. Justice) Blatchford. In that case a petition in bankruptcy was filed in New York, and an adjudication was entered on March 27, 1869. The petitioning creditors then filed an application in New York stating that the estate of the bankrupt was the owner of property in the state of Illinois; that one Kaufman claimed to be an assignee, and that certain other persons had brought actions in the state of Illinois. In that case it was argued that the petitioning creditors had no right to ask for an injunction, *but that the right was limited to the bankrupt prior to adjudication* and to the assignee after adjudication. But Mr. Justice Blatchford said: "There can be no sound reason whatever given for permitting the assignee, after his appointment, or the bankrupt, after adjudication and before the appointment of an assignee, to procure from the court an injunction of the character indicated, which should induce a denial of the power to grant such an injunction after adjudication and before the appointment of an assignee on the application of any creditor." In other words, the right of a

creditor to apply for an injunction is predicated of the fact that as the bankrupt has the power to apply, and as the bankrupt may not apply, the creditor necessarily does have the right to apply.

In the Ulrich case, Fed. Cas., No. 14328, it was pointed out that in the following cases an injunction had been issued on the application of the bankrupt himself:

In Re Schnepf, Fed. Cas., No. 12471;
In Re Wallace, Fed. Cas., No. 17094;
In Re Vogel, Fed. Cas., Nos. 16982, 16983.

In the latter case the order of the district court was affirmed in the circuit court by Mr. Justice Nelson.

So that it is clear the bankrupt itself had such an interest in the controversy that it could have instituted a suit on the equity side of a court having jurisdiction of the parties, or have applied to the bankruptcy court to enjoin the prosecution of the action in attachment brought by the Beekman Company against the Acme Company.

"The court of bankruptcy has also exercised jurisdiction to enjoin suits against the bankrupt instituted *after* the commencement of the bankruptcy proceedings."

Loveland on Bankruptcy, p. 107.

In Re Wollock, 120 Fed., 516, it was argued that while a court of bankruptcy might stay a suit brought before the proceeding in bankruptcy, it had no power to stay a suit brought after the proceeding in bankruptcy. But Judge Kohlsaat said: "There is nothing in the point made by counsel that the court is without power to stay a proceeding begun *after the filing of the petition in bankruptcy*. The argument reduces itself to an absurdity."

It being clear that as the court of bankruptcy itself has the power to stay a proceeding begun after the filing of the petition in bankruptcy, and it appearing further from the authorities cited that pending a petition in bankruptcy and before an adjudication is rendered therein, the bankrupt itself has the right and the power

to protect the estate from dismemberment and has the right to procure an injunction restraining any sale or disposition of the assets constituting the estate, it becomes important now to recur to the practice prevailing in the circuit courts to the state of Missouri.

In a jurisdicion wherein the distinction between suits in equity and actions at law is strictly maintained, such a proceeding by the Acme Company against the Beekman Company, if plenary in its nature, would necessarily have been a suit in equity. It is pointed out in the opinion below (114 S. W., 1095): "The use of injunctions to stay actions at law was almost *coeval* with the establishment of the chancery jurisdiction."

Assuming for the present that the injunction obtained in Illinois had no extra territorial effect, the fact remains that a petition in bankruptcy was pending in a federal court in Illinois, and it is conceded that court had jurisdiction of the proceeding when it was instituted. (114 S. W. Rep., 1091.) Then an action at law is instituted in the circuit court in the state of Missouri, and the defendant in that action pleads the pendency of the proceeding in bankruptcy against it, and pleads affirmatively that the cause should not be prosecuted.

In the state of Missouri, it is well settled, under the code form of procedure there prevailing, where an answer sets up certain facts as a defense, the defendant "is entitled to whatever benefit they give, whether legal or equitable in nature." (*Sachleben* v. *Heinze*, 117 Mo., 520, 526.)

"It is settled law in this state, that under the code, in actions of ejectment, the defendant may, by answer, interpose an equitable defense and have his equities tried and determined in that action without having to resort to an independent suit in equity (citing authorities). Such being the case, then according to the plain reading of the code, affirmative relief may certainly be given to the defendant upon his answer *in all cases* where from the nature of the subject-matter and the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity jurisprudence."

Swope v. *Weller*, 119 Mo., 556, 565.

It is provided in the Missouri Code of Civil Procedure (R. S. of Mo., 1989, Sec. 605): "The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore donominated legal or equitable, or both."

"It was the very purpose of the code, when the common law and equity powers were centered in the same court, to abolish this circumlocution (a separate suit in equity against an action at law), and hence the petition may now have a count at law and a count in equity; the answer may contain a legal defense, an equitable defense, and an equitable cross bill or counter claim, and the reply may set up legal or equitable defenses to the new matter set up in the answer, the object of all of which is to simplify proceedings and to settle the whole controversy between the parties in one action."

Martin v. *Turnbaugh*, 153 Mo., 172, 186.

Thus in *Wendover* v. *Baker*, 121 Mo., 273, the action started in law in the nature of an action to recover on three promissory notes. The answer of the defendant set up equitable defenses, and this was held permissible. (121 Mo., 290.)

So that under the facts pleaded in the answer in the case, it was the duty of the circuit court of Jackson County, Missouri, at Kansas City, itself to have enjoined the prosecution of the action of the Beekman Company against the Acme Company, or, what is to the same effect, should have ordered the action stayed. That duty does not depend entirely upon the validity of the order of injunction issued in Illinois. The Beekman Company is not now being proceeded against as for contempt of court for disobeying the order entered in Illinois. The complaint is that notwithstanding the petition in bankruptcy in Illinois, and notwithstanding the injunction in Illinois, yet nevertheless the state court in Missouri proceeded to a final judgment in the case at bar. Independent of the actual issuance of the order itself, the pendency of the proceedings in bankruptcy was a sufficient ground under the bankruptcy law to require the state court of Missouri to stay the proceedings pending there until the bankruptcy proceedings were at

an end. The failure of that court to so do was a failure to give full faith and credit to proceedings pending in the federal courts in Illinois, and denied to the Acme Company a right given to the Acme Company by the laws of the United States. This right arose from the fact that a petition in bankruptcy had been filed against the Acme Company, and that thereby the assets of the Acme Company had come within the jurisdiction of the federal court, and that thereby the Acme Company had acquired the right to have its assets so administered.

But independent of the foregoing, there is another reason why the defendant, Acme Company, was entitled to have the action stayed pending the proceedings in bankruptcy against it. The action of the Beekman Company against the Acme Company was upon an open account. The judgment which was afterwards rendered was a general judgment. The claim of the Beekman Company against the Acme Company is of a character dischargeable in bankruptcy. That being so, under section 11 of the bankruptcy law, it is provided: "A suit which is founded upon a claim from which a discharge will be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition."

The authorities with respect to the staying of a suit are found collected in the text books on the subject.

2 Remington on Bankruptcy, pp. 1596 *et seq.;*
Loveland on Bankruptcy (3rd Ed.), pp. 107 *et seq.*

II.

In the motion filed in this court, stress is placed upon the contention that the supreme court of Missouri decided that the proceedings in bankruptcy in Illinois were at an end. It is further claimed that, in reaching this result, the court named decided a question of fact as distinguished from a question at law, and that

hence its decision is not reviewable in this court on a writ of error to that court. Hereinafter we shall show that the supreme court of Missouri in fact decided a question of law as distinguished from a question of fact, and that its decision is reviewable on a writ of error to that court. At this point in the brief, we desire to call the attention of this court to the erroneous nature of the conclusion reached in he court below.

The record discloses the filing of a petition in bankruptcy in Illinois, and the entry of the order of injunction. The record does not disclose an order of adjudication, nor does it disclose an order of dismissal. The answer of the Acme Company in the case at bar pleaded the pendency of the proceeding in bankruptcy. The reply of the plaintiff to this answer is not an averment that the proceeding in bankruptcy had been abandoned or dismissed. But the reply is a general denial of the new matter set up in the answer. Thus the reply tenders the issue that the petition in bankruptcy was never filed, and does not tender the issue that having been filed, it was thereafter dismissed or abandoned.

But in the opinion of the supreme court of Missouri there is a statement to this effect:

"It appears that while a petition in bankruptcy was filed in the bankrupt court on November 23, 1903, against defendant, no adjudication had taken place up to October, 1908. Plaintiff (the Beekman Company) asserts, and the record sustains, its contention *that on October* 26, 1903, an adjudication of bankruptcy was denied." (114 S. W., 1092.)

By an examination of the brief filed by the Beekman Company in the supreme court of Missouri (which brief has been transmitted to this court in the record herein), it will be found the contention made to the effect stated is predicated of a letter, which letter in turn is found in the printed record filed in the supreme court of Missouri at page 28.

That letter is dated October 26, 1903, and is addressed to the creditors of the Acme Harvester Company, and is signed by certain gentlemen styling themselves a creditors' committee. The

statement is that the judge of the bankruptcy court *"refused to appoint a receiver."* The statement is also made "at the close of the argument, the court referred the matter to Judge David McCulloch, referee in bankruptcy at Peoria, to inquire into the truth of the allegations of the petition, and to ascertain whether the petitioning creditors have any standing or right to file a petition in bankruptcy."

So we have a rather remarkable state of affairs. A petition in bankruptcy is filed on October 23, 1903, and (three days later) the district judge refuses to appoint a receiver and then refers the matter to a referee "to inquire into the truth of the allegations of the petition and to ascertain whether the petitioning creditors have any standing or rights to file a petition in bankruptcy."

A majority of the supreme court of Missouri reached the conclusion that a failure of a district judge to appoint a receiver on a petition in bankruptcy was a denial of the adjudication in bankruptcy, although it further appeared that in the very document on which that court based such a conclusion the bankruptcy court had referred the matter to a referee to inquire into the truth of the allegations of the petition.

Recalling now that under the bankruptcy law a petition in bankruptcy can not be dismissed except on ten days' notice to the creditors (National Bankruptcy Law, Sec. 58a, subdivision 8), how can it be contended, without an affirmative showing at least, that on October 26, 1903, a court dismissed a petition which had only been filed on October 23, 1903?

On the day that it is claimed the adjudication in bankruptcy was denied, the proceedings were not at issue. On the finding of an involuntary petition in bankruptcy it is required that a subpoena issue, and (Sec. 18, clause b) the bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. It certainly will not be presumed that a court proceeded in disregard of the express provisions of the law.

But no authority can be found to the effect that, when a

district court sitting in bankruptcy, three days after the filing of a petition, refuses to appoint a receiver, the action of the court in refusing to appoint a receiver, operates *ipso facto* as an adjudication that the company is not a bankrupt. The acts of bankruptcy of which an adjudication in bankruptcy is predicated, are found in the National Bankruptcy Law in Sec. 3, clause a. The appointment of a receiver is predicated of the power vested in Sec. 2, subdivision 5 "authorizing the business of the bankrupts to be conducted for limited periods by receivers * * * if necessary for the best interest of the estate."

"The power to appoint a receiver should be invoked with caution, and only when absolutely necessary to preserve assets."

Collier on Bankruptcy (6th Ed.), pp. 19, 20.

"The appointment (of a receiver) is to be made only where absolute necessity for the preservation of the bankrupt's estate requires it."

In Re Rosenthal, 144 Fed., 548, 549.

In Loveland on Bankruptcy (3rd Ed.), the language of the act is quoted, and then cases are cited in which the court has exercised the power of appointing a receiver.

If it be contended that the failure to appoint a receiver is a dismissal of the petition, then it must follow that the converse of the proposition is equally true, the appointment of a receiver is an adjudication in bankruptcy. But this is not true, because *In Re John A. Etheridge Furniture Company,* 92 Fed., 329, a receiver was appointed and the question of an adjudication in bankruptcy did not come up until a later date.

In Re Sievers, 91 Fed., 366, an order was made directing the marshal to hold the property of the bankrupt "until either the petition in bankruptcy in this case is dismissed, or the trustee hereafter to be appointed is qualified."

In *Selkregg* v. *Hamilton Bros.,* 144 Fed., 557, a petition in bankruptcy was filed and an order was issued directing the United

States marshal to take possession of the assets of the bankrupt, and then on a subsequent hearing, the adjudication was refused and the petitioning creditors became liable for damages.

A number of similar instances are found in 1 Remington on Bankruptcy, pp. 234 *et seq.*

As hereinbefore stated, the supreme court of Missouri solemnly decided that because three days after a petition in bankruptcy was filed the court in which the petition was pending refused to appoint a receiver, that thereby and in that manner the court refused to adjudicate the respondent a bankrupt, and did also, without more, dismiss the petition. The cases we have cited show that in a number of instances receivers have been appointed, or the marshal has been directed to take possession of the property, and thereafter an adjudication in bankruptcy was refused. If a refusal to appoint a receiver is a non-adjudication of bankruptcy, is not the converse equally true? And were not all these courts in error, and should they not (having appointed a receiver or directed a marshal to take possession) have immediately followed such an order by adjudication in bankruptcy?

It was also stated in the court below that "while a petition in bankruptcy was filed in the bankrupt court on November 23, 1903, against defendant, no adjudication had taken place up to October, 1908." (114 S. W. Rep., 1091.) It is not entirely clear from the opinion in the court below whether the court places its ruling upon the fact that on October 26, 1903, an adjudication in bankruptcy was in fact denied, because on that date no receiver was appointed, or that thereafter the petition in bankruptcy in some way died of inanition and is is now barred by laches, or was abandoned by non-user, or has been dismissed because not adjudicated.

It is noticeable that in Missouri a motion for new trial may remain pending for fifteen years without losing its force or effect. *St. Francis Mill Co.* v. *Sugg*, 142 Mo., 358.

There is also a Missouri case to the effect that when a claim is filed against an estate in process of administration in a probate court, the fact that the claim does not come on for hearing for some three years thereafter, is not material.

Nichols-Shepard Co. v. *Donovan,* 67 Mo., App., 286.

In this connection the case of *State ex rel.* v. *Hickman,* 150 Mo., 626, is interesting. In that case it was ruled that where a fund came into the custody of a court impressed with certain liens according to certain priorities, "none of the litigants could change the priority because of any laches by any of the other litigants in pressing the determination of their suits."

It was further ruled "No laches can be imputed to an act which could not be done except by permission or tolerance of the court."

In *Sublette* v. *St. Louis etc. Ry. Co.,* 66 Mo. App., 331, it appeared that an action was instituted before a justice of the peace in the year 1883, that an appeal was taken to the circuit court and there dismissed in the year 1884. Then the defendant appealed from the judgment rendered in the circuit court in the year 1884, to the supreme court of Missouri. Ten years later, and in May, 1894, the plaintiff instituted an action on the judgment. The circuit court rendered a judgment in favor of the plaintiff on the former judgment, and ruled "because the defendant had failed to prove that the bill of exceptions was filed and what disposition, if any, had been made of the cause in the supreme court, it should be assumed that the defendant had failed to perfect his appeal by filing a bill of exceptions, or that the cause had in some way been finally disposed of in the supreme court. We cannot agree with this. * * * The defendant, having shown that an appeal was allowed, it devolved on the plaintiff to show that the appeal had been finally disposed of in the supreme court." Accordingly it was held that the suit brought in 1894 on a judgment rendered in 1884, "has been prematurely brought," it not appearing that

the appeal taken from the judgment sued on had been disposed of in the appellate court.

An interesting case in this connection is *Wernse* v. *McPike,* which was heard in the supreme court of Missouri three times: 76 Mo., 249; 86 Mo., 565; 100 Mo., 476. The decision in the last named report was rendered at the April term, 1890, and directed the probate court to proceed with a judgment which had been classified in the probate court in the year 1874. (100 Mo., 488, 493.) So that sixteen years after the classification of a judgment the probate court was directed to proceed with the administration of the estate so that this judgment, then sixteen years old, might be enforced and paid.

In *St. Francis Mill Co.* v. *Sugg,* 169 Mo., 130, it appears that a suit was begun in the year 1875. It was contended in the year 1902, that as the judgments on which the suit was founded were then more than twenty years old, they were conclusively presumed to be paid. "For the purposes of this suit the statute of limitations ceased to run in 1875, and the time covered by the pending of the suit is not to be taken into account, either to create a bar by limitation or raise a presumption of payment." (169 Mo., 136.)

The record in the case at bar discloses that the petition in bankruptcy was filed in Illinois and there is no evidence in the record that the petition was ever dismissed or that any adjudication was ever entered either of bankruptcy or nonbankruptcy. The case at bar was tried in the circuit court in June, 1905, approximately eighteen months after the petition in bankruptcy was filed. The plaintiff in the circuit court did not plead nor prove that the petition had ever been dismissed. The mere fact that the petition remained on file from October, 1903, until June, 1905, when the case was tried in the circuit court, or even until October, 1908, when the case was argued in the Supreme Court of Missouri, does not operate as a dismissal or a discontinuance of the proceeding in bankruptcy.

In Re Driver, 51 Ala., 41, Driver was indicted for murder. He filed an application in the Supreme Court of Alabama for a writ of mandamus directing the circuit judge to discharge him from custody, on the ground that the proceeding against him had been discontinued by operation of law. No term of court was held in the fall of 1873, nor in January, 1874, but the Supreme Court of Alabama ruled:

" * * * The tendency of * * * judicial ruling is decidedly in favor of the retention in court of every cause until it can be fairly heard on its real, substantial merits. And this is justice."

In *Gilbert* v. *Hardwick,* II Ga., 599, a suit was brought prior to the year 1844 by an executor. In April, 1844, the plaintiff had an entry made suggesting his removal from the executorship of the estate. In 1852, the court dismissed the cause and thereafter re-instated the cause. On appeal the Supreme Court decided: "The laying over of this court on the docket for so many terms after the suggestion of Hardwick's removal, without any action, did not amount to a discontinuance."

In *Pierce* v. *Bank of Tennessee,* 1 Swan (Tenn.), 265, an action was brought in the year 1842, and at the appearance term two pleas were filed to the action. "This being done, the cause was suffered to slumber for a period of more than seven years, during which no step was taken by either party to bring the case to trial. The clerk omitted to transfer the suit from the appearance to the trial docket; and it seems to have been lost sight of—the attorney of the bank, as well as the plaintiff in error, being under the mistaken impression that the debt sued for had been adjusted between the maker of the note and the Bank.

"On the 24th of September, 1849, the attorney of the Bank filed an affidavit with the clerk of the court in vacation, setting forth, that the declaration and note were lost or mislaid; and thereupon, caused written notice to be served on Pierce & Pittman, to appear at the October term, 1849, and defend said suit. They accordingly appeared, and in the form of a plea *puis darrein continuance,* alleged, that the suit was discontinued. To this plea,

the plaintiffs replied, and the pleadings were extended to a surrejoinder, to which the defendants demurred, and the demurrer was overruled. Upon the demurrer being overruled, the defendant, on motion, insisted on a discontinuance, but the motion was refused by the court. At the October term, 1850, a paper, stated in an affidavit made by the attorney of the Bank, to be, in substance, a copy of the original declaration and pleadings filed in the cause, appears to have been placed on file in the cause, but without authority, so far as appears from anything in the record before us.

"And at the February term, 1851, upon the pleadings thus substituted, the cause was submitted to a jury, sworn to try the issues joined between the parties, who found for the plaintiff.

"Upon these facts, the first question is, was the suit discontinued? We think not. Here was a suit regularly instituted and depending in the court. The parties have appeared in court, made up the pleadings, and prepared the case for trial. How, then, has the suit lost its *status* in the court? Certainly not by any act, or omission, on the part of the plaintiff, adequate to produce such an effect. The mere delay of the plaintiff to bring the case to trial, for any number of terms after issue joined, is no cause of discontinuance. It seems, neither party moved in the matter from the June term, 1842, till the October term, 1849. The fault of the delay is equally imputable to both. The defendants might have hastened the plaintiff, and forced either trial or nonsuit; and it was their duty to have done so; but having acquiesced in the delay, they cannot now complain of it, much less set up as a ground of discontinuance.

"The case was continued from term to term of the court, by the general intendment of law, that all causes in the court, not otherwise disposed of during the term, are continued over; an express order to that effect, though not unusual, is not absolutely necessary to prevent a discontinuance. Nor does the failure of the clerk to bring the case forward on the trial docket, from term to term, affect the question; the suit is still in legal contemplation, depending in the court, whether or not the clerk has given it its place upon the proper docket."

III.

But it is contended by the Beekman Company in this court, that notwithstanding the serious nature of the questions involved in the case at bar, yet nevertheless the writ of error should be

dismissed because of a want of jurisdiction in this court to review the question arising on the record in this case. It is stated that no federal question is involved, and it is argued that the lower court decided the case as one involving a question of fact and not as one involving a question of law.

An inspection of the record on file in this case will show that at the conclusion of all of the testimony offered on a trial *had before a jury in the circuit court,* the trial judge gave to the jury, an instruction in the nature of a peremptory direction to find for the plaintiff.

It will also be noted that the Supreme Court of Missouri first determined the question of its own jurisdiction, on an appeal to that court, and ruled that a federal question was involved.

The cases cited by the Beekman Company as denying the jurisdiction of this court to review the decisions of a state court of a question of fact, are not cases where the question decided by the state court, is itself of a federal nature. In the case at bar, it was claimed in a state court in Missouri, that because a proceeding in bankruptcy was filed in a federal court in Illinois, and also because that court had issued an order of injunction, the state court of Missouri had no jurisdiction to proceed with the pending action. The state court of Missouri denied that contention. To now say that the denial by a state court in Missouri of the full force and effect which is due the proceedings in the fedeeral court in Illinois shall not be reviewed in this court because the state court in Missouri predicated the result reached by it on a so-called question of fact, is to announce the doctrine that so long as a state court can find some question of fact on which to base its ruling, a state court may, without being subject to review at this court, fail to give full faith and credit to proceedings pending in other courts.

In the brief of the Beekman Company filed in this court, reference is made to *Eastern Building & Loan Association* v. *Ebaugh,* 185 U. S., 114. That case was tried in a state court in

South Carolina, and it was attempted in South Carolina to prove the laws of the state of New York. It was held that in the state of South Carolina, the question, what was the law of the state of New York, as ascertained by its decided cases, was a question of fact and not a question of law.

In this court Beekman Company also cites *Turner* v. *New York,* 168 U. S., 90. In that case, it was ruled that a question whether or not a certain person *was in possession of land,* was a question of fact which could not be reviewed on a writ of error issued out of the Supreme Court of the United States.

Reliance is also placed on *United States Express Co.* v. *Kountze Bros.,* 8 Wall., 342. In that case, it was ruled that questions *with respect to the weight of the evidence* are not reviewable on a writ of error. (8 Wall., 353.)

Behn v. *Campbell,* 205 U. S., 403, cited by the Beekman Company, arose in the Philippine Islands. The general rule was stated: "Upon a writ of error, only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealings with questions of fact."

Dower v. *Richards,* 151 U. S., 658, is also cited by the Beekman Company. It is stated: "This court cannot review the decision of the state court upon the question of fact, *whether the ledge at the time when the townsite patent took effect was known to be valuable* for mining purposes."

The Beekman Company also cites *Selden* v. *Montague,* 194 U. S., 153. That case in turn is simply an affirmation of *Jones* v. *Montague,* 194 U. S., 147. And those cases are to the effect that this court will not consider a moot question.

But in the case at bar, the conclusion reached below is not a conclusion upon a matter of fact, but is a conclusion upon a matter of law.

As hereinbefore indicated, an examination of the record will disclose that at the conclusion of the testimony before the jury,

the trial court gave to the jury a peremptory instruction in the nature of a direction to find for the plaintiff.

In the Supreme Court of Missouri, it has been ruled that "if however, the substantive facts are undisputed, or if reasonable men can draw one inference from the facts proved, the matter may resolve itself *into a question of law.*"

Knorpp v. *Wagner,* 195 Mo., 637, 662.

The court was considering a personal injury case, and was passing on the proposition whether the plaintiff was entitled *to have an issue of fact submitted to the jury,* or whether *a question of law only being involved,* the defendant was entitled to a peremptory instruction in its favor.

In *Nolan* v. *Shickle,* 3 Mo. App., 300, a defendant in a personal injury case, interposed a demurrer to the evidence, and the court ruled that the plaintiff was not entitled to recover, and plaintiff took a non-suit. (3 Mo. App., 304.) The court said: "At common law, in case of a demurrer to circumstantial evidence, the party demurring was obliged to admit, not only every fact, but every conclusion which the evidence conduced to prove, else he could not insist on the jury being discharged." The court quoted with approval the language of Lord Chief Justice Eyre: "But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs on law upon evidence, and the precise operation of that demurrer is to take from the jury and refer to the judge the application of the law to the fact." (3 Mo. App., 309.)

In *Pawling* v. *The United States,* 4 Cranch., 221, a demurrer to the evidence of the defendant was interposed by the plaintiff and sustained below. On writ of error to the Supreme Court, it was ruled the demurrer should not have been sustained. "The party demurring admits the truth of the testimony to which he demurs, and all those conclusions of fact which a jury may fairly draw from that testimony." (Marshall, C. J.)

In *Parks* v. *Ross,* 11 Howard 362, a demurrer interposed by the defendant to the testimony of the plaintiff was sustained, and

was reviewed on writ of error in the Supreme Court of the United States. "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon." The action of the court below in disposing of the demurrer was treated as a matter of law.

In *Nolan* v. *Shickle, supra,* it is further stated: "The action of the court in these cases * * * decides that *in contemplation of law* there is not any evidence to support a verdict." (3 Mo. App., 311.)

Again: "On a demurrer to evidence, the court is obliged to give the fullest effect that the jury by any possibility could legally give to all the evidence in the case. When it has given this effect and arrived at the results of the evidence, the question whether the evidence will sustain a verdict *is purely a question of law*—a question as to the legal effect of ascertained facts." (3 Mo. App., 311, 312.)

In *Borland* v. *Missouri R. R. Co.,* 36 Mo., 484, 491, it is stated with respect to the giving of a demurrer in an action at law that if on the whole evidence the plaintiff is not entitled to recover "the court may determine the whole case *as a question of law.*"

In *Ward* v. *Joslin,* 186 U. S., 142, 147, it was ruled that on a writ of error the findings of the court sitting as a jury, though conclusive on questions of fact, *were "open to the contention that there was no evidence on which they could be based."*

In *Dooley* v. *Pease,* 180 U. S., 126, 131, 132, the distinction is recognized: "Errors alleged in the findings of the (trial court) are not subject to revision by the circuit court of appeals or by this court, *if there was any evidence upon which such findings could be made.*"

"Findings of fact made by the court below are binding here, *if there be any evidence to support them.*"

Runkle v. *Burnham,* 153 U. S., 216, 225.

"The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action *is a question of law which arises in the progress of the*

trial. In a trial to a jury, it is reviewable on an exception to a ruling upon a request for a peremptory instruction."

U. S. F. & G. Co. v. *Board of Commissioners,* 145 Fed., 144, 151 (Sanborn, J.).

In *St. Louis* v. *Western Union Tel. Co.,* 148 U. S., 92, 96, it was held that an application at the close of the trial for a declaration of law that the plaintiff was entitled to judgment for the sum claimed, *"presents a question of law for our consideration."*

In *Laing* v. *Rigney,* 160 U. S., 531, a suit was brought in New York on a judgment rendered in New Jersey. The plaintiff was unsuccessful in the state courts, and a writ of error was sued out of the Supreme Court of the United States to the state court of New York. The defendant claimed that the court in New Jersey had no jurisdiction to render the judgment against him, and to sustain that position, in the Supreme Court, the defendant relied upon a finding made by the trial court to the effect that the defendant was never served with process in New Jersey, and never appeared therein, nor answered to the suit. It further appeared: "The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of fact, *because unsupported by evidence,* present questions of law reviewable in courts of error." (160 U. S., 540.)

Thereupon the Supreme Court of the United States examined into the facts disclosed by the record, and concluded: "As, then, the evidence of the defendant did not avail to show want of jurisdiction on the part of the chancery court of New Jersey to render the decree in question, and as it was admitted that the decree remained wholly unpaid, the plaintiffs below are entitled to judgment." The action of the state court was reversed. (160 U. S., 545.)

So in the case at bar: The trial court having disposed of the question *as a matter of law,* and the evidence relied upon by the Supreme Court of Missouri to sustain the conclusion said to have been reached by that court, being wholly insufficient for that purpose, a question of law does arise which this court has the jurisdiction to examine.

In considering the jurisdiction of this court on the present writ of error, it will be recalled that we are discussing a question arising under the National Bankruptcy law. The power of Congress to enact that law is predicated of the provision in section 8, article 1, of the Constitution of the United States, to the effect, that Congress shall have power to establish *"uniform laws* on the subject of bankruptcies throughout the United States." The constitutional mandate is that the bankruptcy law *shall be uniform* throughout the United States. *This uniformity* can only be attained by this court exercising jurisdiction in matters arising under that law.

In an eminent authority on the subject it has been well said: "All questions arising in state courts, where a right existing under such a law is denied, can be reviewed by the United States Supreme Court."

Taylor on Jurisdiction, Sec. 211.

In *Rector* v. *City Deposit Bank Co.*, 200 U. S., 405, a writ of error was issued out of this court to the Supreme Court of Ohio. That case originated in a court of common pleas in the state of Ohio. At the close of the evidence for the plaintiff, the court, at the request of the defendant, instructed a verdict in its favor and judgment was entered dismissing the action. The action of the court of common pleas was thereafter affirmed by the circuit court of Franklin County, and that action in turn was affirmed by the Supreme Court of Ohio. It was contended the Supreme Court of the United States had no jurisdiction, but it was said: "And as * * * the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of section 709 of the Revised Statutes." (200 U. S., 412.)

So in the case at bar, the right of the Acme Company to have a pending action abated depended upon a law of the United States, and hence this court has jurisdiction to review the action of the court below.

Under the bankruptcy law of 1867, this court assumed jurisdiction *inter alia* of the following cases on writs of error to state courts:

Forsyth v. *Vehmeyer*, 177 U. S., 177;
Sharpe v. *Doyle*, 102 U. S., 686;
Factors etc. Co. v. *Murphy*, 111 U. S., 738, 741;
Mays v. *Fritton*, 131 U. S., CXIV;
Dushane v. *Beall*, 161 U. S., 513, 518;
Williams v. *Heard*, 140 U. S., 529;
Traer v. *Clews*, 115 U. S., 528, 533, 534;
New Orleans etc. R. R. Co. v. *Delamore*, 114 U. S., 501, 506;
Palmer v. *Hussey*, 119 U. S., 96;
Hennequin v. *Clews*, 111 U. S., 676.

Numerous other cases may be found under the law of 1867 to the same effect.

In the recent Digest of the reports of the Supreme Court of the United States, prepared by Lawyers' Co-Operative Publishing Co., in volume one at page 384, paragraph 1940 *et seq.*, the cases are collected, showing the exercise of the jurisdiction of the Supreme Court of the United States to review on writ of error, actions of state courts in bankruptcy cases. See also page 386, paragraph 1968.

In the bankruptcy law of 1898, it is provided in section 25, clause b: "From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases, and no other:

"1. Where the amount in controversy exceeds the sum of $2,000, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States." (30 Stat. L. 553.)

It will thus be noted that in the case of an appeal from a circuit court of appeals to the Supreme Court of the United States the

jurisdiction of this court is the same as on a writ of error issued to the highest court of a state.

Chapman v. *Bowen,* 207 U. S., 89.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases coming to this court under the provisions of the section cited from a circuit court of appeals:

Pirie v. *Chicago Title & Trust Co.,* 182 U. S., 438;
Pickens v. *Roy,* 187 U. S., 177;
Page v. *Edmunds,* 187 U. S., 596;
Jaquith v. *Alden,* 189 U. S., 78;
New York County National Bank v. *Massey,* 192 U. S., 138;
Hewit v. *Berlin Machine Works,* 194 U. S., 296;
Western Tie & Timber Co. v. *Brown,* 196 U. S., 502;
Whitney v. *Dresser,* 200 U. S., 532,
York Mfg. Co. v. *Cassell,* 201 U. S., 344;
Conboy v. *First National Bank,* 203 U. S., 141;
New Jersey v. *Anderson,* 203 U. S., 483;
Hiscock v. *Varick Bank,* 206 U. S., 28;
Gazley v. *Williams,* 210 U. S., 41.

And the following cases under the bankruptcy law of 1898, have been reviewed by this court on writ of error to a state court:

Dunbar v. *Dunbar,* 190 U. S., 340;
Kean v. *Calumet Canal Co.,* 190 U. S., 452;
Tinker v. *Colwell,* 193 U. S., 473;
Crawford v. *Burke,* 195 U. S., 176;
Kaufman v. *Tredway,* 195 U. S., 271;
Birkett v. *Columbia Bank,* 195 U. S., 345;
Cramer v. *Wilson,* 195 U. S., 408;
Bullis v. *O'Beirne,* 195 U. S., 606;
Wetmore v. *Markoe,* 196 U. S., 68;
First National Bank v. *Lasater,* 196 U. S., 115;
Thompsnon v. *Fairbanks,* 198 U. S., 516;

Humphrey v. *Tatman,* 198 U. S., 91;
Rector v. *City Deposit Bank Co.,* 200 U. S., 405;
Eau Claire National Bank v. *Jackman,* 204 U. S., 522;
Hammond v. *Whitredge,* 204 U. S., 538;

(In the last named case a motion to dismiss was made and denied by this court.)

Tindle v. *Birkett,* 205 U. S., 183;
Frank v. *Vollkommer,* 205 U. S., 521;
Bluthenthal v. *Jones,* 208 U. S., 64.

It must also be remembered we are now considering the jurisdiction of this court to review the action of a state court *in denying a right given by the laws of the United States.*

In the case of *Lytle* v. *State of Arkansas,* 22 Howard, 202, the title to certain land was claimed under the pre-emption acts of 1830 and 1832 The same land had been patented in 1833, by the United States to John Pope, governor of the territory of Arkansas, to be appropriated to the erection of public buildings for said territory. The heirs of Cloyes, the first claimant, claimed to have superior equity. The bill filed by the complainants was by the courts of Arkansas dismissed on demurrer and the cause was reversed by the Supreme Court of the United States and remanded for further proceeding. (*Lytle* v. *Arkansas,* 9 How., 314.) On the second hearing the appeal was again dismissed by the courts in Arkansas, and the cause was again taken to the Supreme Court of the United States. In considering the question as to whether the Supreme Court had jurisdiction of the cause, the court said:

"The cause was fully heard on its merits below; and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud, in fact and fraud in law; and the question is, can we take jurisdiction, and reform this general decree? It rejected the title of Cloyes; and in our opinion, it is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas *upon a question of fact or of law.* The fact that the title was rejected in that court authorizes this court to re-examine the decree.

"The decision in the Supreme Court of Arkansas drew in question an authority exercised under the United States, to-wit;

that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is therefore subject to be re-examined, and reversed or affirmel in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States."

In the case of *Mackey* v. *Dillon*, 4 How., 445, 447, the action was an ejectment for land to which each party claimed title by virtue of an act of Congress confirming interfering Spanish claims. The case went to the Supreme Court of the United States by writ of error to the Supreme Court of Missouri under the twenty-fifth section of the judiciary act. In discussing the question of jurisdiction, the court said:

"The powers of the Supreme Court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity of construction of an Act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. *But when evidence is admitted as competent for this purpose*, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, *then the decisions of state courts on the effect of such evidence* may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a Supreme Court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction, and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant."

In the case of *Pollard's Heirs* v. *Kibbe*, 14 Peters, 360, the court said:

"The writ of error in this case brings up the record of the final judgment of the Supreme Court of the state of Alabama. This case is brought here under the twenty-fifth section of the judiciary act of 1789; that court being the highest court of law in that state

in which a decision could be had. It was an action of ejectment, brought to recover possession of a lot of land in the city of Mobile.

"Upon the trial of the cause, the plaintiff claimed title to the premises in question under an act of Congress, and the decision in the state court was against the right and title so set up and claimed. It is, therefore, one of the cases embraced in this section of the judiciary act, which gives to this court jurisdiction to revise the judgment of the state court."

In the case of *Berthold* v. *McDonald*, 22 How., 334, the doctrine announced in the case of *Lytle* v. *State of Arkansas*, *supra*, was affirmed, and the court said:

"The cause was brought to the Supreme Court of Missouri by writ of error, where the judgment of the land court was affirmed; and to revise this judgment, a writ of error was prosecuted out of this court, under the twenty-fifth section of the judiciary act.

"As the title of Gratiot's heirs was directly drawn in question by the foregoing instruction, and as the decision below, giving the instruction, rejected the title, no doubt can exist in regard to the authority of this court to re-examine the decision of the state courts.

"It was so determined, in the case of *Lytle et al, against the State of Arkansas and others*, decided here at this term."

On the whole case, it is respectfully submitted that the pending motion to dismiss or to affirm should be denied; that the case should take its place on the docket of this court for oral argument upon the entire record, and upon such argument being had, this court should reverse the judgment of the Supreme Court of Missouri and remand the record to that court with directions to that court in turn to reverse the judgment of the circuit court of Jackson County, Missouri, so that this case may be proceeded with according to law.

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Office Supreme Court, U. S.
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No. [redacted] 9

Supreme Court of the United States.

OCTOBER TERM, 1910.

ACME HARVESTER COMPANY,
Plaintiff in Error.

v.

BEEKMAN LUMBER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

Brief and Argument for Defendant in Error.

HANNIS TAYLOR,
Counsel for Defendant in Error.

No. 148.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ACME HARVESTER COMPANY,

Plaintiff in Error.

v.

BEEKMAN LUMBER COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The motion heretofore made to dismiss the writ of error herein for want of jurisdiction in this Court, or to affirm the judgment of the court below, was continued until the hearing. In the brief submitted in support of that motion, which is now resubmitted on the final hearing, it was contended that this Court has no jurisdiction to review anything on this writ of error, *for the simple and conclusive reason that no question of law is presented*

by it. It attempts to present for review here *a question of fact adjudicated by the Supreme Court of Missouri, which this Court has no jurisdiction to re-examine.* That question of fact may be briefly stated:

On December 7, 1903, the defendant in error, the Beekman Lumber Company, a corporation organized under the laws of Missouri, attached funds in a bank of that State belonging to plaintiff in error, a corporation organized under the laws of Illinois, and having its chief office at Peoria, in that State. On June 18, 1905, said defendant in error obtained a verdict and judgment for $1,587.52, which has been affirmed by the Supreme Court of the State in question.

It appears that on October 23, 1903, a petition in bankruptcy was filed in the District Court of the United States for the Northern District of Illinois, Southern Division, against the plaintiff in error, and on October 12, 1904, said plaintiff in error—*and not a trustee in bankruptcy, or a receiver appointed by the Court to take charge of its property*—filed in the Circuit Court of Jackson County, Mo., in which the action originated, an answer in the nature of a plea to the jurisdiction presenting questions of fact. When that plea came on for trial on June 20, 1905, it appeared, as a matter of fact, that no adjudication in bankruptcy had been made. To quote the words of the Supreme Court of Missouri "learned counsel for defendant in this Court solemnly admits in open court that, even up to the time of the argument of this cause on appeal to this Court, no adjudication of bankruptcy had been made by the United States District Court for the Southern Division of the Northern District of Illinois. Thus it appears that while a petition in bankruptcy was filed in the bankrupt court on November 23, 1903, against defendant, no adjudication had taken

place up to October, 1908. *Plaintiff asserts, and the record sustains its contention, that on October 26, 1903, an adjudication of bankruptcy was denied.* * * * When the record discloses that Judge Kohlsaat, the Judge of the United States District Court, refused to appoint a receiver, and that two years had elasped before the trial of this case in the Circuit Court of Jackson County, and no adjudication had yet taken place, we think but one rational conclusion can be drawn and that is *that the United States District Court did refuse an adjudication in bankruptcy, and that the steps taken to obtain an adjudication in bankruptcy were abandoned*, and this is buttressed by the testimony showing that with the knowledge and approval of that court a creditors' committee took charge of the affairs of defendant and were administering them, collecting debts due and paying debts owing by defendant. This condition of affairs is utterly irreconcilable with any claim that said District Court has asserted and is asserting jurisdiction as a bankrupt court over the estate of defendant, and has such a custody of said estate as would preclude a creditor from asserting his or its claim against defendant in another court of competent jurisdiction. Certainly an adjudication now could not restore that equality which the bankrupt act contemplates. * * * In our opinion, all these considerations are wholly inconsistent with such a claim, and show, we think, that all idea of such an adjudication has been abandoned, and therefore that the insistence that the mere filing of the petition in bankruptcy without any subsequent adjudication of bankruptcy did *ipso facto* place defendant's property in *custodia legis* of the District Court is not tenable, and the subsequent action of that court convinces us that it in fact refused an adjudication, and that the Circuit Court of Jackson County was not de-

prived of its jurisdiction by attachment on that ground, and it properly so held." It thus appears that the decision of the Supreme Court of Missouri rests purely upon a question of fact. After a careful review of all the facts before it that court has ascertained, as a matter of fact, that an adjudication in bankruptcy was denied. Its language is:

> "Plaintiff asserts and the record sustains its contention that, on October 26, 1903, an adjudication of bankruptcy was denied. * * * we think but one rational conclusion can be drawn and that is that the United States District Court did refuse an adjudication in bankruptcy and that the steps taken to obtain an adjudication in bankruptcy were abandoned, and this is buttressed by the testimony showing that with knowledge and approval of that court a creditors' committee took charge of the affairs of defendant."

It thus appears that after a careful review of the "testimony," the State Supreme Court ascertained, as a matter of fact, (1) that "an adjudication of bankruptcy was denied;" (2) "that the steps taken to obtain an adjudication in bankruptcy were abandoned." In its last word on that branch of the case the State Supreme Court said:

> "*The subsequent action of that* court convinces us that it *in fact refused an adjudication.*"

If that be true then this court need look no further. If no judication of bankruptcy was ever made, and the proceedings abandoned, then certainly the mere fact that a petition in bankruptcy was at one time pending could be no bar to the proceedings of the Missouri Court in which this judgment was rendered.

FINDINGS OF FACT ARE ACCEPTED AS CONCLUSIVE BY THIS COURT ON WRIT OF ERROR TO A STATE COURT.

In Waters-Pierce Oil Co. *v.* Texas, 212 U. S., p. 86, this Court said:

> "Nor does this Court sit to review the findings of facts made in the State Court, but accepted the findings of the Court of the State upon matters of fact as conclusive."

Even where the application of Federal laws is involved, there is no departure whatever from that rule. The fact that a suit is brought to enforce a right or title which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or Laws of the United States. It was therefore held in Mammoth Min. Co. *v.* Grand Central Min. Co., 213 U. S. 72, that the decision of a state court rejecting the contention of an owner of a mining claim that a certain vein or lode has part of its apex in his claim is not reviewable in this Court, where the case turned upon a question of fact. This Court said in that case:

> "The plaintiff in error makes an elaborate argument upon the evidence that the Supreme Court was wrong in its findings of fact. We repeat that upon the writ of error we shall not go into such matters. It is enough to say that, upon the facts as found, neither the record nor the opinion presents a Federal question, and that therefore the writs of error must be dismissed."

In Merced Min. Co. *v.* Boggs, 3 Wall. 310, it was held that a decision in the highest court of a State that no license existed to extract minerals from certain mineral lands (that is, a license inferred from the general policy

of Federal law) *is a finding of a question of fact,* and not a decision against the validity of the license claimed to exist, and is not a judgment upon a question of law which can be reviewed here. In Eastern Bldg. & L. Asso. *v.* Ebaugh, 185 U. S. 114, where the contention was that the plaintiff in error had been deprived of rights guaranteed by the Constitution and laws of the United States, it was held that the question of fact underlying the contention was determined adversely to it by the highest court of the State, and, therefore, that there was no jurisdiction in this Court to review that determination. In that case this court said: "This is a writ of error to the State Court, and whatever was a question of fact there is a question of fact here." The conclusion reached was that "a finding of fact by a State Trial Court as to the law of another State and its application under the decisions of the courts of that State is binding upon the Supreme Court of the United States on error to the Supreme Court of the former State, which decided that such finding of the Trial Court was conclusive upon it." This court will not review *inferences of fact from the evidence* on writ of error. Turner *v.* New York, 168 U. S. 90. Questions respecting *the weight of the evidence* cannot be reviewed on writ of error. United States Exp. Co. *v.* Kountze Bros., 8 Wall. 342. Only questions of law apparent on the record can be considered here on writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact. Behn M. and Co. *v.* Campbell, 205 U. S. 403. Here this case must end because the decisive question of fact has been settled against the plaintiff in error by the State Supreme Court, and there is no jurisdiction here to review that ascertainment.

And yet despite the conclusive and unreviewable

decision of the highest court of the State upon the single question of fact that disposes of the whole matter, counsel for plaintiff in error have undertaken the impossible task of demonstrating that the idea that the judgment of the State Supreme Court rests upon the settlement of a question of fact is really an optical delusion. Into that realm of pure fancy I decline to follow counsel for the plaintiff in error. This Court will need no assistance in the simple task of ascertaining that the judgment of the highest court of the State of Missouri rests solely upon the settlement of a question of fact in which no question of Federal law was involved.

III.

An Academic Discussion as to the Granting of an Injunction by the District Court of Illinois.

If the foregoing contention made in behalf of the defendant in error be sound, the question as to the possible effect of a certain injunction granted by the District Court of Illinois against the defendant in error, *without notice, or the service of a subpoena*, is of no practical importance whatever. If the fact is—*as adjudicated by the Supreme Court of Missouri*—that "an adjudication of bankruptcy was denied," and "the steps taken to obtain an adjudication in bankruptcy were abandoned," then no further inquiry need be made into the matter. Upon that subject the Supreme Court of Missouri has said:

> "Broad and sweeping as the provisions of the bankrupt act are in conferring jurisdiction to grant injunctions to stay suits in other courts, both State and Federal, in order to preserve the estate of the bankrupt and distribute it *pari passu* between and

among his creditors, *it is confined by the terms of the act itself to the territorial limits of the jurisdiction of the District Court.*"

In support of that conclusion the following cases are cited: Toland *v.* Sprague, 12 Pet. 300, 328; *In re* Waukesha Water Co. (D. C.), 8 Am. Bank. Rep. 715, 116 Fed. 1009; Paine *v.* Caldwell, 1 Hask. 452. Fed. Cas. No. 10, 674; Jobbins' Assignee *v.* Montague, 5 Ben. 422, Fed. Cas. No. 7, 329; *In re* Litchfield (D. C.), 13 Fed. 863. Upon those cases the Supreme Court of Missouri bases this statement:

> "If, then, as we have seen, the Bankrupt Court of the Northern district of Illinois was confined by the act of Congress to the territorial limits of said district in issuing process, as has been repeatedly held by the Federal Courts, and could not reach plaintiff, a citizen of Missouri and a resident of the western district of this state, and said court had and has no power to punish plaintiff for a contempt of said injunction, it seems obvious that said Bankrupt Court acquired no jurisdiction over the person of the plaintiff herein, and, as to it, was of no binding or controlling effect, and presented no obstacle to the further prosecution of its attachment suit. Moreover all the authorities cited which deny the power of the District Courts in bankruptcy to reach parties outside of their respective districts were causes wherein there had been an adjudication in bankruptcy and an assignee had been appointed and qualified; and if such was the ruling in these cases, how much stronger is the case of the plaintiff in this case, *wherein no adjudication of bankruptcy of the defendant herein has taken place five years after the initial steps were taken to have it adjudicated a bankrupt, and wherein no trustee, receiver, or marshal of the District Court has been ordered to take charge of defendant's property, and wherein it appears that by and with the consent of said*

District Court the affairs and property of defendant continue to be carried on for its benefit by a selected body of its creditors. Under these circumstances how can it be said that the Circuit Court of Jackson County was transcending the proper limits of its jurisdiction in rendering judgment for plaintiff and refusing to accord to the Federal Court proper respect?"

SUMMARY.

The only litigated matter before the Supreme Court of Missouri was the contested question of fact presented by the answer filed October 12, 1904, "in the nature of a plea to the jurisdiction." That court has carefully summarized the evidence presented for and against that plea. It then sets forth, in definite terms, its ascertainment, as a matter of fact, "that on October 26, 1903, an adjudication in bankruptcy was denied. * * * We think but one rational conclusion can be drawn and that is that the United States District Court did refuse an adjudication in bankruptcy and that the steps taken to obtain an adjudication were abandoned." This court will not review inferences of fact from the evidence on writ of error. Turner *v.* New York, 168 U. S. 90; Dower *v.* Richards, 151 U. S. 658. Questions respecting the weight of the evidence cannot be reviewed here on writ of error. United States Express Co. *v.* Kountze Bros., 8 Wall. 342. This court must accept the ascertainment of fact as the State Court made it—"Whatever was a question of fact there, is a question of fact here." The vital question of fact having been thus irrevocably settled against the plaintiff in error, there is nothing here upon which a question of law can be predicated. It is merely a moot question which this Court will not consider. Selden *v.* Montague, 194 U. S. 153. When the

State Supreme Court ascertained the fact that an adjudication of bankruptcy was denied by the District Court of Illinois, "and that the steps to obtain an adjudication in bankruptcy were abandoned," the claim as to an injunction was necessarily destroyed by that finding. But even if that contention is not sound, it is true beyond all question that the attempted injunction, without notice, to restrain a proceeding in Jackson County, Missouri, was void, because "the bankrupt court of the Northern District of Illinois was confined by the Act of Congress to the territorial limits of said District in issuing process." In no possible aspect of this case can this Court take jurisdiction of it upon this writ of error, which should be dismissed.

Respectfully submitted.

HANNIS TAYLOR,
Counsel for Defendant in Error.

ACME HARVESTER COMPANY *v.* BEEKMAN LUMBER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 9. Argued April 25, 1911.—Decided December 18, 1911.

The denial of a right claimed under the judgment of a Federal court lays the foundation for a review in this court, and where the state court proceeds to judgment on the ground that bankruptcy proceedings against the defendant had been concluded by denial of adjudication and the injunction against suits in the state court thereby dissolved this court has jurisdiction.

A finding by the state court that bankruptcy proceedings had been concluded by denial of adjudication does not conclude this court on writ of error to review the judgment of the state court.

Where the state court bases its jurisdiction entirely on the construction given a Federal statute by it adversely to contention of plaintiff in error, this court has jurisdiction to review the judgment. *Rector* v. *Bank*, 206 U. S. 405.

The filing of a petition in bankruptcy is a *caveat* to all the world, and, in effect, an attachment and injunction. *Mueller* v. *Nugent*, 184 U. S. 1, 14.

It is the duty of the bankruptcy court to promptly determine the ques-

tion of adjudication and to proceed with the selection of a trustee and administration of the estate; and it cannot, even if for the benefit of creditors, deny an adjudication and hold jurisdiction over the estate for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property.

With the denial of adjudication the jurisdiction of the bankruptcy court ends and the property becomes subject to ordinary methods and jurisdiction of courts of competent jurisdiction.

There is no power in the District Court to issue an *ex parte* injunction, without notice or service of process, attempting to restrain a creditor suing in a State outside the jurisdiction of the District Court. Ancillary jurisdiction in aid of the jurisdiction of the District Court exists under the act of June 25, 1910, c. 412, 36 Stat. 838. *Re Wood & Henderson*, 210 U. S. 246, distinguished.

215 Missouri, 221, affirmed.

THE facts, which involve the jurisdiction of the bankruptcy court, are stated in the opinion.

Mr. Alexander New and *Mr. Edwin A. Krauthoff*, with whom *Mr. Arthur Miller* was on the brief, for plaintiff in error, submitted.

Mr. Hannis Taylor for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.[1]

This case is here upon writ of error to the Supreme Court of the State of Missouri. The facts stated in the record disclose that on October 19, 1903, an agreement was formulated, having for its purpose the placing of the affairs of the Acme Harvester Company, plaintiff in error, in the hands of a committee of creditors. With this purpose in view an agreement for the signature of the creditors was circulated, naming a committee of five and calling upon the stockholders of the Acme Harvester Company to deposit their shares with the committee, the directors and officers of the company to resign their respective

[1] Announced by Mr. Chief Justice White in the absence of Mr. Justice Day.

offices, and the committee to have power to elect a board of directors, who should act until the debts of the company were paid in full, and, when so paid, the shares of stock to be redelivered to the owners. In the circular accompanying the agreement for the signature of the creditors it was set forth that the affairs of the company were in such shape that, if kept a going concern, the debts could be paid, and deprecating a resort to legal proceedings in court.

On October 22, 1903, certain creditors filed a petition in involuntary bankruptcy against the Acme Harvester Company in the District Court of the United States for the Northern District of Illinois, seeking to have the company adjudicated a bankrupt, charging that it was insolvent and had made certain preferential transfers of property. On October 24, 1903, the creditors' committee issued a circular in which they recited that one-half the creditors in number and two-thirds in amount had already signed the creditors' agreement; that a petition in bankruptcy had been filed by a law firm claiming to represent three claims, for the purpose of throwing the company into bankruptcy; that one of the creditors had already withdrawn from the proceedings, and setting forth that the success of such proceedings would wreck the company, destroy its business, and sacrifice the value of its assets. The committee added an expression of its confidence that the court would deny an application for a receiver, and leave the business in the hands of the creditors. On October 26, 1903, the creditors' committee issued another circular, in which it was said that the United States District Court in Chicago had refused to appoint a receiver, and in so doing the judge had said:

"This estate is a very large one, and is in the hands of a committee of reputable creditors. It is my judgment that the creditors ought to manage and control the estate. The creditors can produce results much better than any

receiver in handling a large manufacturing concern like the Acme Harvester Company."

The circular further said that the court had referred the matter to the referee in bankruptcy to inquire into the truth of the allegations of the petition, and to ascertain whether the petitioning creditors had any standing or right to file the petition, adding that there was really only one creditor left in the bankruptcy proceeding. On November 2, 1903, a circular was issued in which it was stated that an overwhelming majority of the creditors had signified their approval of the plan, and had executed and forwarded the agreement to the creditors' committee. On December 2, 1903, the Acme Harvester Company, by its vice-president, wrote to the Beekman Lumber Company, calling attention to the fact that the Lumber Company had not yet signed the creditors' agreement, and saying:

"You may not be aware that United States Judge Kohlsaat has stopped the matter of any one bringing suit against this company or endeavoring to throw it into bankruptcy, he having decided that we are solvent and that the only reasonable and fair way to handle the business, paying its debts, etc., is through the medium of the credit committee selected by our heaviest creditors. This being the case the only basis on which your claim will receive recognition is by joining with the balance of our creditors, signing the agreement, thus putting yourself on record that you are a creditor and are entitled to such dividends as from time to time the committee might declare."

The Beekman Lumber Company, it appears, did not sign the creditors' agreement, nor, so far as the record discloses, prove its claim in bankruptcy, and on December 7, 1903, filed a petition in the Circuit Court of Jackson County, Missouri, for the purpose of recovering a judgment against the Acme Harvester Company upon an ac-

count for lumber sold and delivered prior to the institution of the proceedings in bankruptcy. No trustee having been selected in the bankruptcy proceedings, the Acme Harvester Company appeared in the state court to file a motion to stay the proceedings, setting up the pending proceedings in bankruptcy. This motion was sustained on January 11, 1904. On May 14, 1904, motion to stay was overruled, and the former order set aside. On October 3, 1904, a petition was filed in the District Court of the United States at Chicago, where the bankruptcy proceedings were pending, for an injunction against the Beekman Lumber Company to restrain it from further pursuing its action in the state court. An injunction was granted, without notice to the Beekman Lumber Company, on *ex parte* hearing the same day. From reports in the record it appears that the creditors' committee took charge of the company's property, and, as such committee, made reports to the United States District judge at Chicago of the doings of the committee in the management of the property, purchases, sales, etc. The creditors' committee also issued a statement to the creditors, showing the results of the business, enclosing copies of the reports made to the Federal District Court, and recommending a reorganization of the company on the basis of stock issued to creditors, at par, for their claims, and fifty cents on the dollar to creditors who did not go into the reorganization. A circular letter, issued by the committee on April 1, 1905, states that two-thirds of the creditors had already been heard from, about eighty per cent (80%) of them desired stock, and the rest preferred fifty per cent (50%) in cash.

On October 12, 1904, the Acme Harvester Company answered in the state court, setting up the pendency of the bankruptcy proceeding and the issuing of the injunction in the District Court of Chicago. Replication was filed by the plaintiff, and, upon trial, a judgment on the

account was directed and rendered on June 20, 1905, in favor of the plaintiff for the amount of its account. Thereafter proceedings in review were prosecuted to the Supreme Court of Missouri, and that court held that the District Court of the United States had no authority to issue the injunction against proceedings in the state court, and held further that the facts disclosed that the District Court of the United States had declined to adjudicate the Acme Harvester Company a bankrupt, and left the property to be administered outside of the Bankruptcy Law, and that the prosecution in bankruptcy had been abandoned. 215 Missouri, 221.

A motion to dismiss the proceedings for want of jurisdiction was made in this court and passed for consideration to the merits. The contention is that inasmuch as the Supreme Court of the State found, as a matter of fact, that the bankruptcy proceedings had been concluded, by denial of the adjudication and an abandonment of the proceedings, that this finding of fact is binding upon this court upon writ of error to the state court, and therefore there is no substantial basis for the writ of error. We are of the opinion that the contention in this respect is not well founded. The defendant below set up a proceeding in a Federal court as a protection against further prosecution in the state court. It further set up the issuing of an injunction in the Federal court, undertaking to stay proceedings in the state court. Thereby the defendant claimed the benefit of a Federal right, which brought the case within § 709 of the Revised Statutes of the United States. The denial of a right claimed under the judgment of a court of the United States lays the foundation for a review in this court. *Pittsburgh &c. Railway Co.* v. *Loan & Trust Co.*, 172 U. S. 493; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The alleged finding of fact that the jurisdiction of the Federal court had ended cannot conclude this court in